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GRAND JURY DISCLOSURE

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

S. 1676

A BILL TO AMEND THE FEDERAL RULES OF CRIMINAL PROCEDURE TO CLARIFY THE CONDITIONS FOR GRAND JURY DISCLOSURE

NOVEMBER 19, 1985

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CONTENTS

STATEMENTS OF SENATORS

Page

Thurmond, Hon. Strom (chairman) 1
Grassley, Hon. Charles E. 2
McConnell, Hon. Mitch 29

PROPOSED LEGISLATION

Text of S. 1676—A bill to amend the Federal Rules of Criminal Procedure to clarify the conditions for grand jury disclosure 4

CHRONOLOGICAL LIST OF WITNESSES

Statement of Jay B. Stephens, Associate Deputy Attorney General, U.S. Department of Justice, Wash., DC 7
Richards, James R., Inspector General, U.S. Department of Energy, Wash., DC 30
Hamilton, James, attorney, Ginsburg, Feldman & Bress, Washington, DC 38
Panel consisting of: Peter F. Vaira, vice chairman, Grand Jury Committee, Section of Criminal Justice, American Bar Association, Wash., DC, accompanied by Alan C. Brown, member, Section of Public Contract Law, American Bar Association; and David W. Russell, president, National Association of Criminal Defense Lawyers, Wash., DC 51

ALPHABETICAL LISTING AND MATERIALS SUBMITTED

Brown, Alan C.: Testimony 73
Hamilton, James:
  Testimony 38
  Responses to questions submitted by Senator Specter 42
  Responses to questions submitted by Senator Grassley 43
  Prepared statement 47
Richards, James R.:
  Testimony 30
  Responses to questions submitted by Chairman Strom Thurmond 34
  Responses to questions submitted by Senator Specter 36
Russell, David W.:
  Testimony 61
  Prepared statement 65
  Responses to questions from Chairman Thurmond 96
  Responses to questions from Senator Grassley 101
Stephens, Jay B.:
  Testimony 7
  Responses to questions submitted by Senator Specter 10
  Prepared statement 14
Vaira, Peter F.:
  Testimony 51
  Prepared statement 57
  Amicus curiae brief of the American Bar Association, *United States of America* v. *Sells Engineering, Inc., et. al* 76
  Responses to questions of Chairman Thurmond 94
  Responses to questions of Senator Grassley 95

Page

APPENDIX

Statement of Philip E. Coates, Associate Commissioner, Internal Revenue Service 104
Letter and statement of Antonio J. Califa, legislative counsel, American Civil Liberties Union 110

GRAND JURY DISCLOSURE—S. 1676

TUESDAY, NOVEMBER 19, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:02 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators McConnell, Specter, and Laxalt.

Staff present: Michael Wootten, counsel.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

During the 95th Congress, this committee approved a change to rule 6(e) of the Federal Rules of Criminal Procedure which allowed access to grand jury materials by Government experts and support personnel who were deemed necessary to assist attorneys for the Government in the enforcement of Federal criminal laws.

Today, the Committee on the Judiciary will examine whether the same grand jury materials should be used by other attorneys at the Justice Department for civil purposes or by the authorities at other agencies for their use in administrative or noncriminal proceedings.

In the recent Supreme Court decision, the *United States* v. *Sells Engineering, Inc.*, a 5-to-4 Court held that attorneys at the Department of Justice Civil Division could not obtain access to grand jury materials for use in a civil suit without a court order and a showing of particularized need.

The Court also held in *United States* v. *Baggot* that criminal attorneys at the Justice Department could not share grand jury information with other departments or agencies for use in agency administrative proceedings, no matter how compelling the need.

In August of this year, the U.S. Court of Appeals for the Second Circuit, relying on the *Sells* decision, decided that attorneys in the Antitrust Division of the Justice Department must obtain a disclosure order to use grand jury materials for a civil antitrust suit, even though they themselves had conducted the original grand jury investigation.

As a consequence, the Justice Department Criminal Division attorneys are precluded from advising other attorneys of the Department or authorities in other agencies of significant criminal activities they should investigate.

Often, where non-Criminal Division attorneys and law enforcement authorities do learn of allegations of wrongdoing from their involvement with a criminal grand jury or from some nongrand jury source, they must duplicate the entire investigation that was conducted for the criminal prosecution.

The result of these court decisions is to conceal evidence, cause substantial delays, duplicate costs, and thwart justice by preventing the Government from bringing many meritorious civil prosecutions.

On September 20 of this year, at the request of the administration, I introduced S. 1676, the Grand Jury Disclosure Amendments Act of 1985. The act contains amendments to rule 6(e) designed to overcome the impediment caused by *Sells* and *Baggot* to the Government's ability to pursue important noncriminal cases.

A bill with similar provisions, S. 1562, was introduced by Senator Grassley, the able chairman of the Subcommittee on Administrative Practice and Procedure, and is now before the full committee. That measure would go further than the administration bill by expanding access to grand jury information to congressional committees.

The Judiciary Committee has long recognized that grand juries have the dual function of determining whether there is probable cause to believe a crime has been committed and protecting the integrity and the reputation of individuals against unfounded criminal prosecution.

The policy of secrecy surrounding grand jury proceedings promotes the delicate balance between these goals. This policy is based on a number of factors, ranging from the need to preserve open and candid witness participation to protecting the innocent persons who may be falsely or mistakenly accused. What impact, if any, these bills have upon these important goals will be closely examined by this committee.

I want to thank our witnesses for appearing today to share their views. The record will be held open for 1 week in order that the witnesses may submit written comments.

At this point I wish to place a statement by Senator Grassley and the text of S. 1676 in the record.

[Aforementioned follows:]

OPENING STATEMENT OF SENATOR CHARLES E. GRASSLEY

Mr. Chairman, I am pleased to participate in this hearing on grand jury access issues and I commend the chairman for his consideration of this important issue. This hearing will contribute greatly to the committee's consideration of S. 1562, the False Claims Reform Act which was reported favorably from the Subcommittee on Administrative Practice and Procedure, which I chair.

I do not believe there is any dispute that rule 6(e) of the Federal Rules of Criminal Procedure is a necessary safeguard to protect the integrity and function of criminal grand juries. That secrecy, to the extent it serves to protect witnesses and foster candid testimony, should be observed. Rule 6(e) should not, however, be so inflexible that it serves to thwart the Government's rightful recoveries in fraud cases or legitimate congressional oversight of the Justice Department's law enforcement efforts.

My central interest in these reforms focuses on that issue of more effective oversight. My own experience has been that rule 6(e) is not only a statutory impediment to congressional oversight, but has in some instances been utilized by the Justice Department as a shield against legitimate congressional inquiry.

In response to a pattern of unsuccessful Justice Department investigations involving billions of dollars in alleged defense industry fraud, my subcommittee has been conducting an inquiry into the Justice Department's management of major defense fraud cases. That oversight effort has repeatedly run into a number of stonewalls, among them rule 6(e). Complete and effective oversight of systemic weaknesses in law enforcement becomes very difficult when after grand jury information is removed, half of the relevant documents are blank.

To quote the head of the Justice Department criminal division, Assistant Attorney General Steve Trott, "Congress created rule 6(e). If Congress wants access, Congress can change it."

Well, we are here to consider Mr. Trott's suggestion and I would invite Mr. Trott to support and contribute to this effort to provide a solution for the current obstruction of congresional oversight while maintaining adequate protection of grand jury secrecy.

Some of my colleagues on this committee will clearly recall the frustrations of oversight halted by the strictures of an inflexible rule 6(e). In 1979, Senators Kennedy and Metzenbaum sought answers to why the Justice Department failed to indict a major oil company after staff attorneys recommended felony indictments. The Justice Department refused to provide information on the closed investigation and when the senators pursued the information in a judicial setting, a federal district court found that rule 6(e) contained no exceptions for congressional oversight. That court also suggested that Congress amend the law if it desired access to grand jury materials.

The grand jury provision contained in S. 1562 does not provide automatic congressional access to grand jury information . . . to repeat, no automatic access. This provision merely allows congressional committees in performance of their constitutional duty to oversee the executive agencies, an opportunity to demonstrate to the court a "substantial need" for access to certain grand jury information. Those of us in Congress who have been elected as public representatives would then be on the same footing as the Justice Department recommends for agency bureaucrats pursuing administrative functions.

In making grand jury access determinations, the courts regularly balance the need for disclosure against the need for continued secrecy. Allowing Congress to apply under a substantial need test will result in that same balancing analysis. Among many factors, the court will have the opportunity to consider how strong the case for nondisclosure may be in light of the status of the investigation versus how legitimate the congressional inquiry is and whether the requested information is material to that inquiry.

Despite suggestions to the contrary, granting congressional access to 6(e) material in limited situations is not the same as making that information public. As we all know, Congress is routinely entrusted with some of our most sensitive national security and intelligence information. Should information regarding Federal law enforcement practices be withheld as an exception? While some of our witnesses today will bring up the concern of "leaking" as though it were a practice exclusive to the legislative branch, I believe that concern should be balanced against a concern for the executive branch's propensity for hiding its operations from public or congressional scrutiny. Obviously each branch has its weaknesses and each branch has its interests and duties. Neither branch, however, should have its rightful duties foreclosed by the other.

This grand jury access provision is designed to allow flexibility in rule 6(e) for legitimate congressional oversight. The Justice Department currently interprets the law as having no flexibility for legitimate oversight. Congress should respect and maintain grand jury secrecy requirements. But in doing so, Congress should not tie its own hands for essential and effective oversight.

S. 1676

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Grand Jury Disclosure Amendments Act of 1985".

SEC. 2. (a) Paragraphs (A), (B), and (C) of Rule 6(e)(3) of the Federal Rules of Criminal Procedure are amended to read as follows:

"(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

"(i) any attorney for the government for use in the performance of an attorney for the government's duty to enforce federal criminal or civil law; and

"(ii) such government personnel (including personnel of a State or subdivision of a State) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

"(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting an attorney for the government in the performance of such attorney's duty to enforce federal criminal or civil law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.

"(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

"(i) when so directed by a court, upon a showing of particularized need, preliminarily to or in connection with a judicial proceeding;

"(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

"(iii) when the disclosure is made by an attorney for the government to another federal grand jury;

"(iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of State criminal law, to an appropriate official of a State or subdivision of a State for the purpose of enforcing such law; or

"(v) at the request of an attorney for the government, and when so permitted by a court upon a showing of substantial need, to personnel of any department or agency of the United States—

"(I) when such personnel are deemed necessary to provide assistance to an attorney for the Government in the performance of such attorney's duty to enforce Federal civil law; or

"(II) for use in relation to any matter within the jurisdiction of such department or agency.".

(b) The first sentence of subparagraph (D) of rule 6(e)(3) of the Federal Rules of Criminal Procedure is amended to read as follows: "A petition for disclosure pursuant to subdivision (e)(3)(C) (i) or (v) shall be filed in the district where the grand jury convened.".

GRAND JURY DISCLOSURE AMENDMENTS ACT OF 1985

SECTION-BY-SECTION ANALYSIS

On June 30, 1983, the Supreme Court ruled in *United States v. Sells Engineering, Inc.* that Department of Justice attorneys handling civil cases are not "attorneys for the government" for the purposes of Rule 6(e) of the Federal Rules of Criminal Procedure. Therefore they may not obtain grand jury materials that pertain to their cases without a court order; and such an order may be granted only upon a showing of "particularized need." The Court further held that the "particularized need" standard was not satisfied by a showing that nondisclosure would cause lengthy delays in litigation or would require substantial duplication of effort.

In a companion case, *United States v. Baggot*, the Court further limited federal law enforcement abilities by narrowly defining the purpose for which disclosures may be made. It held that agency proceedings such as civil tax audits are not "preliminary to a judicial proceeding", and thus, no court order may be secured in such cases, no matter how compelling the need.

Law enforcement efforts have been frustrated by the inability to share grand jury materials with Department of Justice (DOJ) civil attorneys or with agencies that contemplate using those materials in administrative or regulatory proceedings such as debarments, suspensions, and civil penalty assessments.

The impact of *Sells* and *Baggot* has been profound. First, the prosecutor is precluded from even advising civil DOJ attorneys or agency authorities of significant criminal activities which they should investigate, sometimes preventing meritorious civil cases from being pursued. Then, if the civil attorneys or agencies do learn of the allegations from non-grand jury sources, they must duplicate virtually the entire criminal investigation—and effort which may not be feasible or, at best, will cause substantial delays and require needless expenditure of effort, time and money. While a precise "damage assessment" is impossible, it is believed that the United States has lost millions of dollars as a result of current restrictions on the ability to share grand jury information for civil enforcement purposes.

Accordingly, this proposal contains amendments to Rule 6(e) designed to overcome the impediments caused by *Sells* and *Baggot* to the government's ability to pursue important non-criminal remedies.

Summary of proposed amendments to Rule 6(e)

The amendments will (1) permit automatic disclosure of grand jury materials to DOJ attorneys for civil purposes without a court order; (2) expand the types of proceedings for which other executive departments and agencies may gain court-authorized disclosure to include not only "judicial proceedings" but also other matters within their jurisdiction, such as adjudicative and administrative proceedings; and (3) reduce the "particularized need" standard for court-authorized disclosure to a lesser standard of "substantial need" in certain circumstances. The amendments also resolve another issue left unanswered by *Sells*: whether the same criminal prosecutor who conducted the grand jury investigation is authorized to present the companion civil case.[1]

Below is a section-by-section analysis of the proposed changes:

6(e)(3)(A)(i): Disclosure to civil DOJ attorneys:

In summary, the changes to section (A)(i) provide for automatic disclosure of matters occurring before the grand jury to all DOJ attorneys for use in either civil or criminal cases without court authorization.

Subparagraph (A)(i) would be amended to substitute "any" attorney for "an" attorney and "an attorney for the government's" for "such attorney's". The amendment to (A)(i) would also add "to enforce federal criminal or civil law."

These changes specifically overrule *Sells* and provide that grand jury materials may be used in civil cases. The amendment also answers the "same attorney" question left undecided in *Sells* by allowing the criminal prosecutor to use grand jury materials in a companion civil case. The change will also remove any doubt that prosecutors can disclose grand jury materials in sentencing memoranda and plea proceedings without first seeking court authorization.

The term "to enforce federal civil law" is to be read broadly; it includes enforcement by DOJ attorneys in all non-criminal actions in which the United States is a party, such as admiralty, immigration, customs and damage suits. Disclosure is not limited by the term "judicial proceeding," but can be made, inter alia, for the sole purpose of an initial review of potential civil liability or to facilitate global dispositions of cases, thus eliminating the barrier to settlements caused by the inability to provide sufficient information for the DOJ civil attorney to evaluate the merits of proposed settlements.

This amendment covers disclosure to attorneys only.[2] If further disclosures to nonattorney personnel such as economists, auditors or agents are necessary to assist in the civil case, a court order must be sought (under new section (C)(vi)) as was done before *Sells*.

The proposal recognizes that the primary purpose of a grand jury is, and must remain, to enforce federal criminal laws and in no way alters that well-founded policy. It would therefore be the intent of Congress that the Department issue policy guidelines that restate existing practices and the current case law that a grand jury may not be improperly used to gather evidence for civil purposes. To make the criminal priority explicit, the guidelines will state that the criminal prosecutor has the discretion to decide whether and when to disclose materials to civil attorneys; and further, to decide what materials should be disclosed. The prosecutor can, and often will, delay disclosure until an indictment is returned or a grand jury investigation is completed to protect both the integrity of the grand jury process and the identity of witnesses. Disclosures will be limited to only those materials relevant to the civil case as has always been the practice.

6(e)(3)(B): Disclosure by government personnel who assisted the grand jury to civil DOJ attorneys:

The addition of the words "civil law" will permit personnel to whom disclosure has been made for criminal purposes pursuant to subparagraph (A)(ii) to utilize that material to assist any attorney for the government in enforcing civil law. It will allow civil DOJ attorneys to discuss the evidence not only with the criminal prosecutor, but also with the agents and auditors who worked on the grand jury investigation. Yet the purposes and limitations of (A)(ii) are not changed: disclosure to government personnel without court order will continue to be made only for the purpose of assisting the prosecutor in enforcing federal criminal law; disclosure for civil purposes still cannot be made without court authorization.

The provision simply serves to insure that the civil DOJ attorney's access to grand jury material is meaningful, while not increasing the number of persons to whom disclosure is made without court authorization. The amendment is particularly important in fraud and other complicated cases where agents and accountants have analyzed or audited voluminous documentary evidence and financial records. These persons are obviously more familiar with the intricate details than is the criminal prosecutor. Were they not permitted to explain their work product to the civil DOJ attorney, the purpose of granting access to civil attorneys would be defeated. Such communication may be necessary for the civil attorney to understand the case, to make an informed judgment as to the merits of initiating a civil suit or to enter into negotiations for a concurrent criminal and civil disposition of a matter. Without the amendment, grand jury materials would have to be further disseminated to additional agents and auditors for their analysis and would result in needless delays and duplication of effort.

Again, it is contemplated that the permission and specific authorization of the criminal prosecutor will be required before any person to whom disclosure has been made for criminal purposes may discuss a case with another attorney for civil purposes. The prosecutor will control whether and when disclosure will be made to civil DOJ attorneys under subparagraph (A)(i) and whether and when agents may discuss the case with the civil attorney under this paragraph.

6(e)(3)(C)(i): Court-authorized disclosure for use in judicial proceedings: Particularized need:

This section is amended by the addition of the words "particularized need" to reflect the existing standard for court-authorized disclosures made preliminary to or in connection with a judicial proceeding. While not changing current law, the addition of the term "particularized need" is intended to demonstrate the contrast between this higher standard and the lesser standard of "substantial need" that is required in new section (C)(v), applicable when government agencies seek disclosure with the concurrence of the Department.

This provision will provide the only available method of disclosure for private parties. It can also be used by government agencies when the Justice Department exercises its discretion and declines to request disclosure under new section (C)(v). Those government agencies with independent litigating authority would thus be able, over our objection, to gain access to grand jury material under this section if they could meet the higher "particularized need" standard.

6(e)(3)(C)(v): Disclosure to governmental agencies upon request of DOJ and a showing of "substantial need" for matters within the jurisdiction of agencies:

This is an entirely new section intended to cure the *Baggot* problem by eliminating the requirement that court-authorized disclosure must be for use in a "judicial proceeding", and also to overrule *Sells* by reducing the "particularized need" standard to a "substantial need" standard. It applies to government agencies seeking disclosure and governs disclosures by civil DOJ attorneys to persons assisting them in their civil cases.

At the request of an attorney for the government:

This language is intended to insure that this section is applicable only when the Department of Justice requests a disclosure order. The discretion and responsibility will remain with DOJ to screen all requests and balance the agency's need for disclosure against a high duty to preserve the secrecy of the grand jury. If an agency disagrees with a denial, it can seek court approval pursuant to subparagraph (C)(i), where it must demonstrate particularized need.

Upon a showing of substantial need:

This is intended to lessen the "particularized need" standard articulated by the majority in *Sells*. The term is designed to make clear that to whatever extent *Sells* precludes or minimizes a court's consideration of the government's saving time or increasing efficiency in its disclosure determinations, *Sells* no longer applies. Rather, in applying the "substantial need" test, a court would be required to balance the reasons justifying continued grand jury secrecy against the countervailing need for disclosure.

Under this standard, a court could consider a number of factors, including but not limited to, any of the following: (1) the public interest—particularly the protection of the public health or safety—served by disclosure to a governmental body; (2) the burden or cost of duplicating the grand jury investigation; (3) the potential unavailability of witnesses; (4) the fact that the department or agency already has a legitimate independent right to the materials; (5) the avoidance of unnecessary inefficiency or waste of resources; (6) the need to prevent ongoing violations of law; and (7) the expiration of an applicable statute of limitations. In weighing these considerations, a court would not be able to deny disclosure merely because the agency for whom disclosure is sought may have alternative discovery tools available to it.

On the other hand, the "substantial need" test does not contemplate that a court would become simply a "rubber stamp" for the government's request for disclosure. Review under this standard should require an attorney for the government to make more than a showing of mere convenience or simple relevance to matters within the jurisdiction of the agency.

To personnel of a department or agency:

This applies to personnel of all executive branch departments and agencies as defined in 18 U.S.C. § 6.

When such personnel are deemed necessary . . . [to assist DOJ attorneys] . . . to enforce federal civil law.

Disclosures by civil DOJ attorneys to nonattorney assistants, such as agents, auditors, economists and non-DOJ personnel, for aid in the civil case are governed by this new subparagraph. Requiring court authorization for such assistance reflects an intent to return to the pre-*Sells* situation: that civil attorneys have automatic access to materials, but need court authorization for further disclosures to non-lawyers assisting in their civil litigation. Court authorization would not be necessary for ancillary staff assitance such as secretaries and paralegals.

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[1] We have included in our proposed statute the amendments to Rule 6(e) that were recently transmitted by the Supreme Court to Congress pursuant to the Rules Enabling Acts, and that are due to become effective on August 1, 1985.

[2] The Government has long taken the position, for which there is no contrary case authority, that disclosure to an attorney for the government impliedly permits the attorney to disclose the material to support personnel such as secretaries and paralegals.

"For use in a matter within the jurisdiction of an agency":

This eliminates *Baggot's* narrow interpretation of "preliminary to a judicial proceeding" and makes clear that an agency's administrative, enforcement and other non-judicial proceedings are included. Since the phrase "matters within the jurisdiction of an agency" has already been broadly interpreted in cases involving 18 U.S.C. § 1001, it was selected to avoid listing every conceivable agency proceeding.

This amendment would overrule *Baggot* by permitting agencies to use grand jury material for such non-judicial actions as suspensions, debarments and other penalty proceedings. It is proposed in recognition of the greater emphasis and responsibilities Congress has placed on agencies to prevent fraud and punish abusers of their programs. Offices of Inspectors General have been established; agencies also possess new powers to assess monetary penalties and are encouraged to use their suspension and debarment powers more frequently. Recent experiences in the banking industry demonstrate that swift action should be taken in non-judicial agency proceedings to avoid bank failures. To expect agencies to be more effective while denying them the evidence to initiate or sustain their actions is contrary to sound public policy.

Agency personnel who receive court-authorized disclosures of grand jury materials under this subparagraph will be authorized to use the material only for the purposes for which the court order was granted; they may make no further disclosures. This is the current practice and no alteration is intended by these proposed amendments.

"Matters" includes, but is not limited to, administrative, enforcement, regulatory, and penalty proceedings. Listed below are representative examples of the federal agencies and the types of agency proceedings for which disclosure would be authorized under this subparagraph:

(1) Banking authorities for use in licensing, bank examinations and approvals for change in control or ownership;

(2) Internal Revenue Service for tax deficiency audits;

(3) Securities and Exchange Commission for both investigative and judicial proceedings;

(4) Agencies, such as the Nuclear Regulatory Commission, for licensing and inspection purposes;

(5) Agencies, such as the Department of Defense and the Department of Health and Human Services, for suspension and debarment proceedings and audit resolutions.

Not every agency action or type of proceeding will present an appropriate reason to disclose grand jury matters. Therefore the criminal and, where appropriate, also the civil attorney, will have discretion to determine when court-authorized disclosure to agencies should be sought. Disclosures will not be sought by Departmental attorneys without careful consideration of all factors and a determination that there is a strong public interest for each disclosure.

6(e)(3)(D): *Procedure for obtaining court-authorized disclosures*:

A technical amendment is necessary in this paragraph to reflect the proposed subparagraph (C)(v) which provides additional circumstances for court authorized disclosure.

The **Chairman**. Our first witness today is Hon. Jay B. Stephens, Associate Deputy Attorney General, Department of Justice. Mr. Stephens, if you will come around, you may proceed with your testimony.

STATEMENT OF JAY B. STEPHENS, ASSOCIATE DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. **Stephens**. Thank you very much, Mr. Chairman. It is a pleasure to be here this morning to discuss with the Senate Judiciary Committee the issue of grand jury secrecy and access to secret grand jury materials and the impact which that has on our economic crime enforcement effort.

As the chairman has indicated, grand jury secrecy really is the hallmark of our criminal investigative process and our enforcement system. But we have found that unnecessary limitations on that secrecy can seriously frustrate our civil and administrative law enforcement efforts in the executive branch.

The bill which the chairman has introduced, we believe, is a very significant piece of legislation in our antifraud effort. It is one piece of the eight-part bill recommended by the administration and it is, we believe, probably the most significant piece of that legislation.

I am happy to say that the other portions of that package are moving along, both before Senator Grassley's subcommittee and Senator Cohen's subcommittee.

There are two or three important issues here today which I think the committee is seeking to address. One is the access to grand jury materials by Civil Division attorneys within the Department of Justice. The second is access by other agency/department attorneys—for example, SEC, FCC, IRS, and other enforcement agencies. And the third is whether or not congressional committees should have access to grand jury materials.

We believe that the decision of *Sells Engineering* and the decision in the *Baggot* case have substantially hampered enforcement efforts in the economic crime area. What we are seeking essentially, Senator, is a return to the situation before those two decisions.

As you indicated in your opening comments, it was a sharply divided Supreme Court, a 5 to 4 decision—a decision which we think clearly is not based on any constitutional concerns, but it is based on a reading of 6(e) as drafted and passed by the Congress.

We would seek to have the amendments which are in the bill introduced by the chairman, and we believe that would substantially increase our efforts to deal with economic crime.

The second issue which we would like to address, also, is whether or not Congress and congressional committees should have access to grand jury material. That issue is not raised in the administration's bill introduced by the chairman. It is introduced and raised by Senator Grassley's bill, in S. 1562.

We think there are substantial separation of powers questions, due process questions, and issues relating to grand jury secrecy that suggest that congressional access to grand jury material would be inappropriate and would raise constitutional concerns, as well as significant concerns as far as the integrity of the criminal justice process.

The amendments to rule 6(e) that we have proposed in S. 1676 really are a result of careful consideration and study over the last 2 years since the Supreme Court issued its decision in *Sells*.

We have determined that the impact of *Sells* has really had a significant deleterious impact on our ability to deal with economic crime at the investigative stage, at the prosecutive stage, and at the settlement stage.

That decision in June 1983 by, as I indicated, a sharply divided, 5 to 4, Supreme Court, essentially indicated that Department of Justice attorneys on the civil side were not attorneys for the government, as that concept is understood in rule 6(e).

The Court in *Sells* required that in order for attorneys on the Civil Division side of the Department of Justice to obtain any materials developed through the grand jury process, they would have to obtain a court order and that the court would have to find a particularized need for those attorneys to obtain that material.

This was a standard that was different from what had obviously been used before the *Sells* decision. What we are seeking here is basically to go back to the situation that existed prior to the *Sells* decision when it was possible to share certain grand jury materials with attorneys in the civil division so that they could use their enforcement powers on the civil side as a complement, to or in addition to, the criminal enforcement authorities on the criminal side of the house.

Chief Justice Burger's dissent demonstrated that the majority's analysis in *Sells* was inconsistent with the legislative history underlying 6(e), and that the law enforcement effect of that decision would be substantially negative.

He analyzed the harmful effect by saying, and I quote:

> It is inevitable that countless meritorious civil actions will never be investigated or prosecuted unless the Attorney General routinely assigns civil fraud lawyers to help work up criminal fraud cases. On its face, this process will be a wasteful practice in terms of the use of time of Department lawyers.

In addition to the *Sells* decision, in the same year the Supreme Court came down with a companion case, *United States* v. *Baggot*, which essentially indicated that agency proceedings are not "preliminary to a judicial proceeding," and that concept of being "preliminary to a judicial proceeding" was a prerequisite in order for agency attorneys to obtain or utilize any grand jury materials.

Because of that ruling, agency attorneys were essentially precluded even from obtaining a court order to be able to utilize any grand jury materials collected during the course of a criminal investigation by the Department of Justice.

As I have indicated, the impact of *Sells* and *Baggot* really has been quite profound, both in terms of the whole range of decisions that relate to enforcement actions on the criminal side and on the civil side, but particularly on the civil side—whether or not to initiate an action; whether or not, once that action is initiated, you have to run through an entire duplication of effort in terms of obtaining the information that might underlie the filing of a civil action; the kind of delay that is inherent in that process; whether or not the statute of limitations may run; situations in which there has been a loss of resources to the Government because we have not been able to file civil actions; situations where we are essentially duplicating both the criminal side of the investigation and then, following the civil side of the action, we are doubling the resources necessary to obtain the same kind of result.

Also, we have seen a negative impact in terms of how agencies proceed with their investigations and their relationship to the Department of Justice. Agencies commit an investigator to a criminal investigation; that investigation may result in no indictment. Then the Department goes back to that agency and says: Now you have committed someone for 2 years to this process, and we would like you to commit someone else for another year or two, or possibly three, to do a civil investigation of this. Agencies, rightfully, are somewhat concerned. They say, we have committed substantial resources to this; it did not result in a criminal prosecution; now we have to give you someone different because under *Sells* and under *Baggot,* they cannot utilize the same auditor or the same investigator that participated in that investigation, so they have to assign somebody completely new and forget basically that the resources they committed had any impact at all on the case and start over from scratch.

Also, in terms of trying to reach settlements—whether they be global settlements in terms of civil and criminal actions or whether there be some impact, for example, in the defense procurement area on debarments and suspensions—it is very difficult for the Civil Division to exercise its judgment in a rational way to determine whether or not they should agree to a settlement on the civil side because they do not have access to the kind of information and material they need at the point in time when those settlement judgments need to be made.

Criminal prosecution may have progressed to the point where there is an indictment or there is about to be an indictment or an information filed. The defendant may wish to plead guilty and also to settle the concomitant civil liability.

You bring in the civil attorney from the Civil Division of the Department of Justice, and that attorney really is hamstrung. He or she cannot make an intelligent decision whether or not to settle out the civil claims because basically they do not have access to that kind of information.

The prosecutor cannot give the Civil Division attorney that kind of information. The Civil Division attorney cannot call up the auditor or the investigator from the agency or from the FBI or from whatever other agency may be investigating it.

So, essentially, you have to operate in the dark, and that is not a very effective and wise way to utilize resources or to run an enforcement mechanism.

Now, as I indicated, we believe that what this has resulted in is an illogical compartmentalization of responsibilities within the Department of Justice. This illogical compartmentalization has been counterproductive; it is something that has flowed from the *Sells* decision and from the *Baggot* decision.

Senator **Specter**. Excuse me. May I interrupt for just a minute?

Mr. **Stephens**. Certainly, Senator.

Senator **Specter**. I regret the interruption. I am just told that I am due to open up another Judiciary subcommittee hearing on juvenile justice. But I just want to thank you for coming and commend the chairman for convening this hearing and to submit certain questions for the record.

[Aforementioned was subsequently supplied for the record.]

QUESTIONS SUBMITTED BY SENATOR ARLEN SPECTER

Question. What is your view regarding the bill's definition for access?

Answer. The bill would provide such free access to federal, civil and administrative agencies that there is a great danger that the grand jury would be invoked for the wholesale use of gathering material for the use of civil and administrative agencies. In my written statement I have outlined how this procedure could easily arise.

Question. Do you feel that Congressional committees should be accorded a more relaxed standard to obtain access to grand jury materials?

Answer. I do not feel that Congressional Committees should be accorded anymore relaxed standard than others. The grand jury is a law enforcement tool, without many of the traditional use of safeguards. The grand jury is permitted these great powers because society values the swift investigation of criminal activity. Any other use of the grand jury material should be strictly guarded. To permit Congress to gain access to grand jury material based upon the relaxed standard of "substantial need" for whatever committee that could demonstrate this standard would be a misuse of the grand jury powers. See my statement, p. 4 for an elaboration of this argument.

Question. What is your opinion regarding the effect on witnesses who count on secrecy in coming forward of the exchange of information among agencies? Do you feel that the absence of civil immunity will have a chilling effect on witnesses?

Answer. I believe that the free disclosure of grand jury information to civil agencies would have a chilling effect on prospection witnesses. The Supreme Court recited these reasons in *United States* v. *Sells Engineering Inc.*, 463 U.S. 418, 425. The grand jury should be free to pursue rumors, tips, hearsay. Witnesses should be free to testify to such. The end result is that after a free and thorough examination the truth will emerge. The complete disclosure of this unqualified information will inhibit the free flow of information necessary for the investigation of crime.

Senator **Specter**. I apologize for the interruption. Thank you.

Mr. **Stephens**. Thank you, Senator.

Senator **McConnell** [presiding]. Thank you, Senator Specter. I will join you shortly.

Senator **Specter**. OK.

Senator **McConnell**. Go ahead.

Mr. **Stephens**. Another issue which really dramatizes the problem we face as a result of *Sells* is what we can call the "same attorney problem." *Sells* left this open, although the recent second circuit decision in the antitrust case referenced by the chairman addressed it, perhaps not directly on point: That is whether or not an attorney who does a criminal investigation can then do a concomitant civil investigation.

This problem is particularly onerous where you have a small U.S. attorney's office and the U.S. attorney may only have three or four or five assistants in the office. The question is, if you have two of those engaged in a criminal investigation, how do you, in fact, separate whether or not you have to have someone else in that office completely redo the investigation or whether the attorney who is familiar with it can put out of his mind the criminal investigation part of that case and turn to the civil side.

As the recent decision in the second circuit in the antitrust case indicated, in effect, while the court left open the door for that attorney on the criminal side to handle the civil proceeding, it did so only if, and I quote, "he could independently recall the details of 250,000 pages of subpoenaed documents or the details of testimony by dozens of witnesses"—really a rather Herculean effort and not something which suggests the logicalness or the rationality of an effective enforcement approach.

I would also like to suggest that what we are talking about with respect to sharing of information between the Criminal Division and the Civil Division within the Department or between civil and criminal enforcement attorneys in U.S. attorneys offices is really not at that stage a civil liberties issue.

We do ~~think~~ the civil liberties issue arises when we get to the point of congressional access, but we are talking about a unified enforcement mechanism within the executive, within the Department of Justice--the department which really has the most at stake in terms of protecting grand jury secrecy.

We would also like to point out that this is not a constitutional issue, as I think I indicated early on in the testimony; that this is really an interpretation of rule 6(e). It is a policy choice for the Congress, and it is one which has and can have a dramatic effect on our ability to deal with economic crime enforcement.

The controls remain on grand jury even with this proposed change in 6(e). The Federal courts are there to monitor grand juries. The Department is there to protect the secrecy of grand juries. Contempt is there as a sanction against attorneys who violate the grand jury process. Dismissal of cases is there.

The Department attorneys are all subject to those kinds of constraints and sanctions currently, and they would continue. And we believe the courts really are the appropriate agency to monitor compliance with 6(e), even under amended 6(e) as we have suggested, and that that is a better approach than having a blanket rule that essentially says you cannot share under most circumstances information which you have developed in the course of a criminal investigation with the civil side of the house.

I would like to comment briefly on the second issue, and that is congressional access to grand jury material, particularly Senator Grassley's bill, S. 1562. That bill tracks the proposal introduced by the chairman and recommended by the administration substantially, with two variations.

One of those variations is the standard by which agencies obtain access to grand jury material and whether or not that would be with the consent of, or essentially at the request of an attorney for the Government; that is, an attorney with the Department of Justice. We think it is essential that we have that safeguard in there.

And the second is congressional access to grand jury material pursuant to a court order. The bottomline on this issue, we think, is that essentially enforcement and prosecution of criminal, civil, and administrative violations really are quintessentially an executive function.

The Supreme Court recognized in *Buckley* v. *Valeo* that the Constitution entrusts to the executive the responsibility of enforcing the law. That enforcement mechanism has relied historically very heavily on the grand jury process; traditionally, the grand jury process has depended upon secrecy in terms of being able to develop the kinds of information and material, in terms of encouraging a witness to come forth, in terms of encouraging informants to come forth, and in terms also of protecting the civil liberties of individuals who are under investigation, but who may not be indicted.

We believe that congressional access to grand jury material would not aid in that kind of enforcement effort. Indeed, it would have the countereffect in that it would raise substantial constitutional concerns in terms of separation of powers as to where the enforcement authority lies; due process issues in terms of fairness and the application of decisionmaking with respect to criminal prosecutions; as well as the issue of opening the door for raising concerns about potential political influence or persuasion upon criminal prosecutions.

It also essentially raises another issue for defense counsel to raise. It is another avenue to challenge the legitimacy of the criminal investigation, whether or not this prosecution was brought straight on the merits or whether or not there was some unnecessary or undue influence on that prosecution.

Finally, as I indicated, grand juries are there also to protect the reputation of innocent persons who may have been the subject of a grand jury investigation, but who are not indicted, whom the grand jury has determined not to indict. It is important that those persons not have their reputations then opened up to challenge and to harassment by a process that opens up the grand jury material without the same constraints that are there to protect those individuals that you would find in the judicial system.

For these reasons, the Department has very strong concerns and very firm opposition to the concept of congressional access to grand jury material.

Finally, very briefly, on the third issue of agency access to grand jury materials, as I indicated, Senator Grassley's bill also includes that, but he does not include the provision for that access being predicated upon approval of, or request by, an attorney for the Government.

Here again, we would like to go back to our concern about maintaining the integrity of the criminal investigative process by not having an automatic referral to an agency of grand jury material, by not having that material available to an agency upon demand, but by being able to control that access with concerns in mind of maintaining the integrity of the criminal investigative process. By so doing, we do not have unnecessary intrusion into that process; we do not have timing impacts on the process; we do not have disclosures that would disrupt the criminal investigation.

These are concerns that we think can be alleviated by maintaining that relationship between the agency and the Department that would permit agency access, but with the consent and upon the request of an attorney for the Government.

We think that will be a substantial benefit as far as the health and safety and welfare of our regulatory systems and our adjudicatory systems. There are issues that arise where we have been unable to notify—whether it be the Nuclear Regulatory Commission, the Securities and Exchange Commission, the FDIC—agencies that have regulatory responsibilities which have a substantial impact on the health and safety of our country because of the contraints on access to grand jury material.

Senator, that concludes my prepared remarks. We think this is extremely important legislation. We would ask that the Judiciary Committee consider this, and we know you will, with great care, and would ask that, to the extent possible with your schedule, this be moved along expeditiously.

We think this is one of the most significant reforms that Congress can take to improve our economic crime enforcement effort.

[Prepared statement follows:]

PREPARED STATEMENT OF JAY B. STEPHENS

Mr. Chairman and Members of the Committee:

It is a pleasure to be here today to discuss the complex and critical issue of access to grand jury information as it impacts on the government's ability to fight fraud and abuse. While the secrecy of grand jury deliberations is a hallmark of our judicial system, unnecessary restrictions on the ability of government attorneys to use grand jury information can seriously frustrate civil and administrative law enforcement efforts. In fact, the recent decisions of the Supreme Court in United States v. Sells Engineering, Inc., 103 S. Ct. 3133 (1983) and United States v. Baggot, 103 S. Ct. 3164, have had exactly that effect. Consequently, Mr. Chairman, as a part of its anti-fraud initiative, the Administration has proposed an amendment to Rule 6(e) of the Federal Rules of Criminal Procedure to permit attorneys enforcing civil laws to have access to grand jury information. Agency attorneys could also have access to grand jury information upon a showing of substantial need. Mr. Chairman, the Administration's bill, which you introduced as S. 1676, is one of the most important law enforcement initiatives pending before the Congress.

As I will explain at greater length in my testimony, the Sells and Baggott decisions have had a significant deleterious effect on our attempts to deter complex, economic crime and to protect the federal Treasury. In an era of growing financial and legal sophistication, we can ill afford these artificial restrictions on the sharing of information by the government's overworked attorneys and investigators. This Congress rightfully has made anti-fraud legislation a major priority, and it is a priority which this Administration shares -- as demonstrated by the Attorney General's recent submission of the

Department's eight-bill, anti-fraud package. Continued restriction on access to grand jury materials will inevitably frustrate our anti-fraud efforts.

A second, important issue presented here today is that of congressional access to grand jury information. Senator Grassley's bill, S. 1562, largely tracks the Administration's proposal, but also permits committees of the Congress to obtain access to grand jury information by directly petitioning the court upon a showing of substantial need. The question of congressional access raises significant separation of powers concerns and portends intrusions into the enforcement responsibilities of the Executive which could jeopardize the independence and integrity of the criminal justice process as well as trammeling the rights of individuals who may be the subject of an investigation. While we are sensitive to the oversight role of Congress, the Administration feels that the congressional access to grand jury evidence envisioned by S. 1562 does not substantially assist that oversight role and would be inappropriate.

I

Before proceeding with a discussion of these important issues, I note that the amendment to Rule 6(e) is only one part of our multi-faceted, anti-fraud initiative. Several other Administration bills are pending before Congress and our False Claims Act amendments -- second only to grand jury reform in their importance to our anti-fraud effort -- were recently reported from the Administrative Practice and Procedure Subcommittee as part of S. 1562. I want to commend Senator Grassley, Senator Thurmond and Senator Metzenbaum for their work on this important legislation. I am particularly gratified to be able to state that the Administration does not oppose the "qui tam," or citizen suit, provision of Senator Grassley's False Claims Act, as reported by subcommittee. We would hope, therefore, that our False Claims Act amendments can move forward quickly --independent of grand jury reforms if need be -- to prompt Senate passage.

A third Administration-backed bill, Senator Cohen's Program Fraud Civil Remedies Act (S. 1134), is being considered this morning by the Senate Governmental Affairs Committee. Its prompt passage would greatly strengthen our ability to recover on small fraud cases through the use of an administrative civil penalty mechanism.

Several other portions of the Administration's fraud package are pending with this Committee, including S. 1674, the Federal Courts Improvement Act Amendments; S. 1675, the Bribes and Gratuities Act; and S. 1677, the Anti-Fraud Criminal Enforcement Act. We urge the Committee to take prompt action on these bills as well, in the hope that they may be reunited with the other portions of our anti-fraud package before it moves out of committee.

II

The amendments to Rule 6(e) pending before the Committee are the product of lengthy study and careful deliberation. It has been over two years since the Supreme Court's decision in Sells effectively closed off access to grand jury material by government attorneys enforcing civil laws. Since that time, Sells has seriously interfered with our economic enforcement capabilities in all areas -- including procurement fraud, antitrust and tax fraud. These amendments are an extremely important legislative change which Congress could adopt to aid in our civil economic crime enforcement effort.

On June 30, 1983, in a sharply divided, 5-4 decision, the Supreme Court ruled that Department of Justice attorneys handling civil cases are not among the "attorneys for the government" who are entitled to grand jury material under Rule 6(e) of the Federal Rules of Criminal Procedure. United States v. Sells Engineering, Inc., 103 S. Ct. 3133 (1983). Therefore, they may not obtain grand jury materials that pertain to their cases without a court order; and such an order may be granted only upon a showing of "particularized need". The Court further held that the "particularized need" standard was not satisfied simply by a showing that non-disclosure would cause lengthy delays in litigation or would require substantial duplication of effort.

In a lengthy dissent, Chief Justice Burger demonstrated that the majority's analysis was inconsistent with the legislative history underlying Rule 6(e) and effective law enforcement. The dissent also correctly analyzed the harmful effect of the decision:

> . . . it is inevitable that countless meritorious civil actions will never be investigated or prosecuted, unless the Attorney General routinely assigns civil fraud lawyers to help work up criminal fraud cases. On its face, this process will be a wasteful practice in terms of use of the time of Department lawyers.

103 S. Ct. 3133 at 3164 (Burger, C.J. dissenting).

In a companion case, United States v. Baggot, 103 S. Ct. 3164 (1983), the Court further limited federal law enforcement ability by narrowly defining the purpose for which disclosures may be made. It held that agency proceedings, such as civil tax audits, are not "preliminary to a judicial proceeding," and thus, no court order may be secured in such cases, no matter how compelling the need.

Law enforcement efforts have been frustrated by the inability to share grand jury materials with Department of Justice civil attorneys or with agencies that contemplate using those materials in administrative or regulatory proceedings such as debarments, suspensions, civil penalty assessments and tax audits.

The impact of Sells and Baggot has been profound. First, the prosecutor is precluded from providing civil Department of Justice attorneys or agency authorities with sufficiant information to determine whether they should investigate potential violations of the law. Then, if the civil attorneys or agencies do learn of the allegations from non-grand jury sources, they must duplicate virtually the entire criminal investigation -- an effort which may not be feasible or, at best, will cause substantial delays and require needless expenditure of effort, time and money. In one instance alone, Civil Division attorneys expended four staff-years to completely reconstruct a complex, economic fraud case. While a precise "damage assessment" is impossible, it is believed that the United States has lost millions of dollars as a result of current restrictions on the ability to share grand jury information for civil enforcement purposes.

An excellent example of the disastrous effect of Sells is presented by a recent decision of the Second Circuit in a case entitled In Re: Grand Jury Investigation, decided on September 24, 1985. The case involved bid rigging and price fixing by American companies in the U.S. government-financed sale of a product to a foreign government. Following a grand jury investigation, the Antitrust Division concluded that criminal prosecution would not be appropriate, but that a civil prosection under the False Claims Act should be pursued. After attempting to obtain meaningful consultation with the Civil

Division without reference to grand jury materials, the Antitrust Division obtained an order under Rule 6(e)(3)(C)(i) showing "particularized need" and permitting it to share certain limited portions of its fact memos discussing the case. Following review of this information and consultation between the two divisions, the government concluded that civil action was warranted. However, the strictures of Sells may have frustrated the government's ability to proceed with its civil remedy.

In balancing the government's need for the information against the need for grand jury secrecy, the Second Circuit concluded that because the government could have duplicated the investigation through other means (the use of the Antitrust Division's CID authority) the government had not met the high showing of "particularized need" required and, hence, the information should not be shared; this, despite the extremely limited disclosure that actually took place. In effect, the Court concluded that wherever the government can, theoretically, duplicate a complex grand jury investigation -- even if only at great, and effectively prohibitive, expense -- it fails the "particularized need" test. The result in this case is particularly shocking in that the Court did not reach this conclusion in a case of first impression, but in the context of concluding that the district court judge abused his discretion in granting the 6(e) order. If the standard set in this case becomes the prevailing law, the civil side of the government will never gain any access to grand jury information.

Moreover, the entire concept of an artificial distinction between the civil and criminal responsibilities of the Department of Justice is illogical and counterproductive. The Attorney General, as the nation's chief law enforcement officer, is necessarily responsible for pursuing both civil and criminal remedies. Yet, the logic of the Sells decision requires him, and his top aides, to somehow "compartmentalize" their knowledge. Each United States Attorney, as the senior law enforcement official in each judicial district, faces the same dilemma. In fact, the separation of the Department into civil and criminal divisions, in addition to promoting greater specialization, protects grand jury secrecy by limiting the sharing of grand jury information. Yet, the strictures of Sells might be defeated by simply merging all the Department's attorneys into one, large "civil and criminal" division.

The Sells court left open the question of whether the same attorney who conducted the criminal prosecution could also conduct the civil phase of the litigation. 103 S. Ct. 3133 at 3141, n. 15. The Second Circuit did not address whether the prosecutor should be disqualified from the civil case, but it did prohibit him from having any further access to the information. In effect, the court left open the door for him to handle the civil proceeding, but only if he "could independently recall the details of 250,000 pages of subpoenaed documents or the details of testimony by dozens of witnesses." Slip op. at 16. Here, too, the result of applying the Sells rationale leads to an illogical conclusion -- that is, the size of the criminal investigation may determine whether the same attorney can legally and practically continue to represent the United States in all related proceedings.

The litigation growing out of "Operation Bittersweet," another multi-million dollar, economic fraud investigation, provides another example of the crippling effect of Sells on our enforcement efforts. In investigations involving four separate grand juries, agents of the Customs Bureau, the Department of Agriculture and the FBI uncovered a massive fraud in the sugar refining industry which cost the Customs Service $50 million and the American consumer untold millions more. Yet, efforts to obtain a civil remedy will be complicated by limitations on the civil use of those critical grand jury materials such as agency audits in our attempt to recover the taxpayers' money. In fact, even if we attempt to duplicate the entire, enormously complex investigation, it is doubtful that we could complete the necessary work on the case before the six-year statute of limitations expired, thus leaving the government with only its questionable, common-law, contract remedies.

And these are but a few of the nearly insurmountable dilemmas our civil attorneys face in attempting to vindicate the government's rights after Sells. At each ste[illegible] complex, economic crime litigation, clever defense [illegible]ill raise additional objections. The added burden on our resources is enormous.

With respect to the impact of Baggot, an earlier case provides perhaps the most dramatic example of the mischief resulting from the Court's holding. A grand jury, investigating possible criminal tax offenses by a major corporation, subpoenaed between 200,000 and 300,000 pages of documents. Approximately 33,000 hours of IRS staff time were expended in the organization and analysis of this material. Over 100 witnesses testified before the grand jury and the transcript of their testimony exceeded 30,000 pages. Subsequently, in order to pursue a civil tax investigation against the corporation, involving a potential income tax liability of $300,000,000, an application for a Rule 6(e) order was filed with the court, but the order was denied for reasons similar to those later announced by the Supreme Court, greatly hampering further investigative efforts.

These are but a few illustrations of the adverse impact on the public fisc of the restrictions on access to grand jury information created by Sells and Baggot. The added burden on the resources of the Justice Department and of other affected agencies is also enormous.

Finally, this is not a civil liberties issue. Opposition by contractors to deny access to grand jury material is nothing more than an attempt to disrupt cooperation and coordination of the government's criminal and civil remedies. It is counterproductive in the extreme, and, as a practical matter, impossible to run wholly separate criminal and civil investigations. The investigator and the auditor who have worked on a criminal matter are the only ones in a position to help civil attorneys evaluate the potential merits of a civil case. New auditors and investigators cannot hope to promptly and efficiently duplicate complex investigations so that decisions on whether to proceed civilly on the myriad of investigations that begin as criminal matters can be timely made.

The proposed legislation is not intended to allow civil attorneys to direct criminal prosecutors to undertake grand jury investigations or direct their course. The federal courts remain available to police the strictures of Rule 6(e) and to apply sanctions where necessary. Therefore, legal procedures to police Rule 6(e) are more appropriate than a broad prophylactic rule.

Accordingly, in its proposal, the Administration recommends amendments to Rule 6(e) designed to overcome the impediments caused by Sells and Baggot to the government's ability to pursue important non-criminal remedies. The amendments will (1) permit disclosure of grand jury materials without a court order to Department of Justice attorneys for civil purposes; (a practice which was exercised prior to Sells) (2) expand the types of proceedings for which other Executive departments and agencies may gain court-authorized disclosure to include not only "judicial proceedings," but also other matters within their jurisdiction, such as adjudicative and administrative proceedings; and (3) reduce the "particularized need" standard for court-authorized disclosure to government agencies to a lesser standard of "substantial need" in certain circumstances. The amendments also resolve the issue left unanswered by Sells by permitting the same criminal prosecutor who conducted the grand jury investigation to present the companion civil case.

Finally, I would remind the Committee that the amendments, in no way implicate any constitutional safeguards. The Sells and Baggot decisions were based upon the legislative history and policies underlying a procedural rule -- Rule 6(e) -- not on the Constitution. The defendant's right to the protection of the grand jury indictment process pre-dates 1787 and is incorporated in the Fifth Amendment, but the details of the system's operation clearly can be adjusted by Congress. The issue, then, is one of striking a proper balance between the competing concerns of grand jury secrecy and the government's law enforcement responsibilities. Grand jury secrecy is in the government's interest. Therefore, this Department is best suited to represent, balance and protect these interests.

In conclusion, that Sells has seriously impaired our civil law enforcement activities is clear beyond contradiction. The case for amendment is equally clear.

III

Let me now turn to the issue of congressional access to grand jury information. S. 1562 adopts, except in two important respects, the Justice Department's proposal to modify Rule 6(e). The important respects in which S. 1562 departs from the Justice Department's proposal are (1) its provision permitting Congress court-ordered access to grand jury materials, and (2) the deletion of the requirement that would permit administrative agencies to obtain court-ordered access to grand jury materials only "at the request of an attorney for the government".

The most significant difference between S. 1562 and S. 1673 is the provision in S. 1562 for congressional access to grand jury materials. For the following reasons, we believe that change would be unwise and would raise grave constitutional questions. Consequently, we oppose its inclusion in the legislation.

The Supreme Court has recognized that the prosecution of criminal, civil, or administrative violations is quintessentially an Executive function. Buckley v. Valeo, 424 U.S. 1, 138 ("A lawsuit is the ultimate remedy of law and it is to the President, and not to Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'") The federal government has always relied heavily upon the grand jury system to carry out its criminal law enforcement functions. Traditionally, the government also made use of materials developed by the grand jury in the criminal context to assist in the prosecution of related civil or administrative proceedings (either in addition to, or in lieu of, criminal prosecutions). Our enforcement of these civil and administrative remedies, however, has been greatly hampered by the judicial constructions of Rule 6(e) that strictly limit the uses to which grand jury materials can be put outside the context of criminal prosecution.

That is the basis for our proposed amendments to Rule

6(e): to assist in the pursuit of civil or administrative enforcement by permitting access to information developed -- to aid the Executive in obtaining sanctions against the perpetrator.

Congressional access to 6(e) materials, on the other hand, would not aid the Executive in fair and efficient enforcement of the laws, but would interfere with the Executive's duty to enforce the law. Moreover, the Department of Justice has an obligation flowing from the due process clause to ensure that the fairness of the decision making with respect to its prosecutorial function is not compromised by excessive congressional pressures. It therefore has been the position of this Department that it would be inconsistent with both the separation of powers and due process clauses for Congress to become a partner in an investigation through its access to 6(e) materials. If a congressional committee is fully apprised of all details of an investigation as it proceeds, there is a substantial chance that congressional pressures will influence the course of the investigation; in any event, this situation will permit litigants additional avenues to challenge the legitimacy of a criminal investigation.

We believe that separation of powers and due process concerns are applicable when Congress is seeking files of open and closed investigations. In particular, the possibility that persons who are ultimately not prosecuted may be subjected to prejudicial publicity is as great from congressional inquiry into open as into closed investigations. Equally important, we believe that due process concerns are implicated by a rule that would allow Congress access to files of grand jury investigations, whether open or closed. One of the core functions of the grand jury, and a prinicipal basis for the secrecy of its proceedings, is to protect the integrity and reputation of innocent persons whom the grand jury determines not to indict. The possibility that persons who are not indicted may be subjected to accusation and attack, outside the context of the protections of the judicial system, as a result of congressional inquiry into grand jury investigations is a substantial further reason for the Department's firm opposition to the concept of permitting access by Congress and its committees to grand jury materials.

Finally, congressional access to grand jury materials threatens the traditional secrecy of grand jury proceedings. Secrecy has always been a key element of the operation of the grand jury system. Secrecy allows the grand jury to conduct its investigations and deliberations without unnecessary interference; it tends to avoid a politicizing of the process and unwarranted publicity that might chill witnesses, prosecutors, and grand jurors in the exercise of their duties and it protects the rights of subjects of the grand jury's investigation who are ultimately exonerated. Secrecy also ensures protection for witnesses and encourages informants to be forthcoming. We would oppose any revision in Rule 6(e) that would undermine the effectiveness of the grand jury system -- including a revision that would compromise the necessary secrecy attending grand jury processes.

Of course, in the past, the Department has sought to accommodate requests from particular congressional committees for investigative materials on an ad hoc basis by appropriate application to the courts, and subject to necessary protective conditions. We believe that this process of negotiation has served the legitimate purposes of congressional inquiry, and we anticipate that such arrangements can be made in the future when we can ascertain that they would not undermine the integrity of federal law enforcement responsibilities or the other goals of grand jury secrecy.

Finally, we have significant reservations about the provisions of S. 1562 which would permit access to grand jury material by other Executive Branch agencies without the consent of the Department of Justice. The Department of Justice has the preeminent interest in, and responsibility for, preserving grand jury secrecy and maintaining the integrity of the criminal investigative process.

Department of Justice approval should be required before institutions not involved in the grand jury process gain access to 6(e) materials. In this regard, I note that S. 1562, as drafted, deletes the requirement in our proposed amendment to Rule 6(e)(3)(C)(v) that would permit administrative agencies to obtain court-ordered access to grand jury materials only "at the request of an attorney for the government". Without that limitation, the risks simply would be too great of compromising the purposes of grand jury secrecy, especially the risk that ongoing investigations or prosecutions could be jeopardized by untimely revelations of grand jury matters in the course of parallel agency proceedings. Access by other enforcement agencies to grand jury material cannot be simply upon demand, but must be coordinated carefully with those engaged in criminal enforcement responsibilities to avoid unnecessary intrusions into the criminal investigative process.

That concludes my prepared statement, Mr. Chairman. I would be happy to answer any questions the Members of the Committee might have.

Senator McConnell. Thank you, Mr. Stephens.

The chairman had to go to the Labor Committee to help make a quorum and I have got to go to another subcommittee. He has a series of questions here that will be submitted to you for the record.

Senator McConnell. I also have an opening statement which will be provided.

What I am going to have to do, and I apologize to the witnesses—the chairman should be back momentarily, but I am going to have to have a recess in the hearing because I simply have to go to another subcommittee hearing.

So this hearing will be in recess for a few moments.

[The prepared statement follows:]

STATEMENT OF SENATOR MITCH MCCONNELL IN SUPPORT OF S. 1676
THE GRAND JURY DISCLOSURE ACT AMENDMENTS OF 1985
NOVEMBER 19, 1985

MR. CHAIRMAN, I HEARTILY COMMEND YOU FOR YOUR LEADERSHIP IN INTRODUCING THIS BILL, S. 1676, A BILL TO AMEND THE FEDERAL RULES OF CRIMINAL PROCEDURE TO CLARIFY THE PROCEDURES FOR DISCLOSURE OF GRAND JURY MATERIALS. THIS IS IN MY JUDGMENT AN IMPORTANT BILL, ONE THAT WILL GREATLY ASSIST US IN BRINGING A MORE REASONABLE APPROACH TO LAW ENFORCEMENT AS WELL AS TO THE GOVERNMENT'S CONTROL OF ITS CONTRACTING ACTIVITIES. I AM PROUD TO BE AN ORIGINAL COSPONSOR.

AS YOU KNOW, THE "GRAND JURY DISCLOSURE ACT AMENDMENT OF 1985," WOULD GREATLY AID INVESTIGATIVE EFFORTS BY ALLOWING GOVERNMENT ATTORNEYS WHO ARE INVESTIGATING CIVIL CASES FOR THE GOVERNMENT, LIKE THOSE INVESTIGATING CASES FILED UNDER THE FALSE CLAIMS ACT, TO HAVE ACCESS TO MATERIALS PRESENTED TO A GRAND JURY IN A RELATED CRIMINAL PROSECUTION. THIS LEGISLATION WILL BE ESPECIALLY HELPFUL TO GOVERNMENT ATTORNEYS INVOLVED WITH THE CIVIL PROSECUTION OF THOSE PERSONS INVOLVED IN COMPLICATED AND EXTENSIVE WHITE COLLAR FRAUD CASES. LAW ENFORCEMENT EFFORTS HAVE BEEN FRUSTRATED BY THE INABILITY TO SHARE GRAND JURY MATERIALS WITH DEPARTMENT OF JUSTICE (DOJ) CIVIL ATTORNEYS OR WITH AGENCIES THAT CONTEMPLATE USING THOSE MATERIALS IN ADMINISTRATIVE OR REGULATORY PROCEEDINGS SUCH AS DEBARMENTS, SUSPENSIONS, AND CIVIL PENALTY ASSESSMENTS.

UNDER RULE 6 (E), THE PROSECUTOR IS PRECLUDED FROM EVEN ADVISING CIVIL DOJ ATTORNEYS OR AGENCY AUTHORITIES OF SIGNIFICANT CRIMINAL ACTIVITIES WHICH THEY SHOULD INVESTIGATE, SOMETIMES PREVENTING MERITORIOUS CIVIL CASES FROM BEING PURSUED. THEN, IF THE CIVIL ATTORNEYS OR AGENCIES DO LEARN OF THE ALLEGATIONS FROM NON-GRAND JURY SOURCES, THEY MUST DUPLICATE VIRTUALLY THE ENTIRE CRIMINAL

INVESTIGATION AN EFFORT WHICH MAY NOT BE FEASIBLE OR, AT BEST, WILL CAUSE SUBSTANTIAL DELAYS AND REQUIRE NEEDLESS EXPENDITURE OF EFFORT, TIME AND MONEY. WHILE A PRECISE ESTIMATE OF THE RESULTANT IS IMPOSSIBLE, IT STANDS TO REASON THAT THE UNITED STATES HAS LOST MILLIONS OF DOLLARS AS A RESULT OF CURRENT RESTRICTIONS ON THE ABILITY TO SHARE GRAND JURY INFORMATION FOR CIVIL ENFORCEMENT PURPOSES.

THESE ARE SOME OF THE MOST VEXING CASES THE JUSTICE DEPARTMENT HANDLES, BECAUSE THE EVIDENCE NECESSARY TO THE SUCCESSFUL PROSECUTION OF THE CASE IS WITHIN THE POSSESSION OF THE DEPARTMENT BUT UNAVAILABLE TO THE LAWYERS HANDLING THE CIVIL ACTIONS INVOLVED. THESE AMENDMENTS WILL GREATLY ASSIST WITH THOSE CASES, WITHOUT COMPROMISING THE INTEGRITY OF THE GRAND JURY.

ONCE AGAIN, MR. CHAIRMAN, I COMMEND YOU FOR YOUR LEADERSHIP IN THIS FIELD, AND LOOK FORWARD TO THE TESTIMONY OF THE WITNESSES.

[A brief recess was taken.]

The CHAIRMAN [presiding]. The committee will come to order. The next witness is Mr. James R. Richards, inspector general, for the Department of Energy.

Mr. Richards, you may proceed.

STATEMENT OF JAMES R. RICHARDS, INSPECTOR GENERAL, U.S. DEPARTMENT OF ENERGY, WASHINGTON, DC

Mr. RICHARDS. Thank you, Mr. Chairman. I am James Richards, the inspector general of the Department of Energy. I am here to present the views of all of the statutory inspectors general regarding S. 1676, your bill, and section 5 of S. 1562, Senator Grassley's bill. We welcome the opportunity to testify before you today on these bills to amend the Federal Rules of Criminal Procedure to clarify the conditions for grand jury disclosure.

The inspectors general strongly support the goal of these bills to enhance the Government's ability to expeditiously and efficiently pursue noncriminal remedies to fraud against the Government.

A primary responsibility of the statutory inspectors general has always been to conduct criminal investigations of individuals and entities who defraud the programs or operations of their respective agencies.

But equally important, however, is the role of IG's to develop cases for administrative sanction, such as debarment or suspension, and civil and administrative recoveries. It is these tools that ensure that funds lost to fraud are returned to the U.S. Treasury and that wrongdoers are prevented from continuing to do business with the Government. Such successful administrative actions act as a strong disincentive to fraud against the Government.

However, current restrictions on disclosure of grand jury materials pose a significant barrier to successful pursuit of civil and administrative remedies. Under present law, prosecutors are prohibited from releasing grand jury materials to executive agencies for use in administrative or enforcement actions even where the agency personnel were directly involved in the investigation.

Thus, in order to proceed with such cases, the affected agency must reinvestigate the matter, using other agency personnel, at considerable cost to the Federal Government and the taxpayer. It is ironic, at best, that such civil action to remedy fraud and abuse can often come only after a significant and costly duplicative use of Federal resources.

The problem I have described is graphically illustrated in the following two examples.

The Department of Commerce Office of the Inspector General was involved in the investigation and prosecution of a construction manager who was responsible for building a municipal center under a grant from the Economic Development Administration.

The construction manager pled guilty to submitting false claims. Although the grand jury had conducted an exhaustive review of the finances pertaining to construction, none of the program officials responsible for management of the project were privy to that information, nor could they get access to that information.

As a result, the Office of the Inspector General had to assign auditors to duplicate, at great cost, virtually the entire criminal investigation in order to substantiate the dollar loss to the Government for purposes of civil or administrative recovery.

At the Department of Health and Human Services, OIG agents investigated a husband-and-wife team of anesthesiologists. In the course of the investigation, the agents obtained complete hospital and personal records concerning these two physicians. All of these records were subpoenaed and presented to the grand jury.

Ultimately, the U.S. attorney declined to prosecute the case. Thereafter, the doctors attempted to remove nearly $1 million from their bank to foreign banks. The U.S. attorney sought a temporary restraining order preventing this transfer of funds. However, because OIG agents could not use any of the grand jury material, and since there was no other way to establish civil liability or overpayments within the limits of the restraining order, the case was settled without benefit of these records. Such a settlement represented only an educated guess as to loss to the Government.

Mr. Chairman, these are but two examples of too many instances where inability to obtain access to grand jury materials has resulted in potential loss to the Government. We believe that the bills under consideration today would remedy this problem by authorizing, in appropriate cases, release of grand jury materials directly to agency attorneys, investigators and auditors for use in civil, administrative and enforcement efforts.

It is important, too, to note that the agency access to grand jury records under either bill will certainly not be unrestrained. Reasonable safeguards are included in these bills.

First, under either bill, the agency may only obtain grand jury records pursuant to a court order issued upon a showing of substantial need. Under S. 1676, the Department of Justice is required to request the disclosure. If DOJ declines to do so, the agency, like a private party, may seek a court order upon a showing of particularized need preliminary to or in connection with a judicial proceeding.

Under S. 1562, an agency or a congressional committee may directly request a court order upon a showing of substantial need without prior DOJ approval. Thus, the latter provision would impose fewer restrictions on agency access to grand jury material.

However, in practice, there would be little difference between the two. We have no reason to believe that DOJ would refuse to seek access to grand jury materials on behalf of an agency absent some compelling reason; for example, such release might adversely affect criminal proceedings. In that event, an agency would be unlikely to proceed on its own anyway. Therefore, we have no strong preference between the two bills.

In summary, Mr. Chairman, we strongly support the proposed legislation. Departments and agencies across the Government are aggressively pursuing those who defraud or cheat the Government—really, the taxpayers of America—to ensure that money wrongfully obtained is returned to the Treasury and to protect the Government from further depradations by such persons or entities.

These amendments are vital to an effective law enforcement effort, one that ensures that the Federal Government uses all of the sanctions and remedies at its disposal—criminal, civil and administrative—in its efforts to combat fraud and abuse in programs and operations of the Government.

Thank you, Mr. Chairman. I would be glad to respond to any questions.

The CHAIRMAN. Thank you, Mr. Richards. I just have a few questions here and I may have more for the record.

Mr. Richards, who do you believe to have the ultimate responsibility to decide if grand jury material should be shared with agencies outside the Department of Justice, the prosecutor for the Government or the court—and why?

Mr. RICHARDS. Well, I think the court ought to have the authority to determine whether or not grand jury material can be shared with people outside the Government. But as far as inside the Government, among prosecutors, Department of Justice attorneys, I think clearly the rule and the best practice and most efficient way would be to allow the Department of Justice to have access without court order.

The CHAIRMAN. Now, what safeguards are in place or what would you propose to minimize the possibility of unauthorized disclosures of grand jury materials and prosecutorial abuse?

Mr. RICHARDS. I think there are adequate safeguards already in place, Mr. Chairman. Certainly, I do not think that these decisions were prompted by any egregious abuses.

The CHAIRMAN. Mr. Richards, has your agency ever had to duplicate from scratch an investigation that you knew had been completed by the Justice Department, and if so, could you supply this committee with some figures which would indicate how much that duplicative effort cost the taxpayers and the man-hours involved?

Mr. RICHARDS. I am not aware, since these two decisions were handed down in 1983, of any such instances at the Department of Energy, which I represent. However, I mentioned in my statement, Mr. Chairman, two instances from the Departments of Commerce and Health and Human Services where this happened.

I will go back and ask those Inspectors General if they can ascribe any dollar figures to those duplicative efforts. That may be difficult, but I will try to do that and supply it.

The CHAIRMAN. If you could furnish that for the record, I think it would be helpful.

Mr. RICHARDS. I shall do that.

[Aforementioned follows:]

Department of Energy
Washington, DC 20585

November 26, 1985

Honorable Strom Thurmond
Chairman, Committee on the
Judiciary
United States Senate
Washington, D. C. 20510
Attention: Mr. Michael Wootten, Counsel

Dear Mr. Chairman:

In response to Mr. Michael Wootten's, Counsel to the Staff, letter, dated November 20, 1985, to me, please find enclosed my responses to the questions submitted for the record during the November 19, 1985, hearing on S. 1676 and S. 1562 concerning access to grand jury information.

In addition, I am submitting for the record, as requested by staff counsel, the following information regarding the examples given in my testimony to the Committee during the hearing on November 19, 1985:

> In the first example, because the Department of Commerce could not gain access to grand jury information, the auditors were required to duplicate the work of the criminal investigators in order to obtain financial information necessary to proceed with civil or administrative action against the offending contractor. The Department of Commerce estimates that this repetition of work cost the Federal Government several thousand dollars. In the second example, the Department of Health and Human Services could not gain access to grand jury information related to the filing of false claims by two anesthesiologists. As a result, the Department was required to settle the action based solely on a "guess" as to the amount unlawfully paid to the physicians. The cost to the Government was the difference between the amount of the settlement and the actual amount of over-payments paid to the physicians. However, absent access to grand jury information, we cannot ascertain the amount of this loss.

Should the Committee have any further questions or need additional information, please call.

Sincerely,

James R. Richards
James R. Richards
Inspector General

Enclosure

Senate Judiciary Committee
November 19, 1985

Questions submitted by Chairman Strom Thurmond

Answers thereto, submitted by James R. Richards, Inspector General, U.S. Department of Energy

1. Question:
   One difference between the two bills being examined today is that S. 1676 charges the Department of Justice with the discretion and responsibility of requesting the courts to order disclosure to outside agencies, while S. 1562 allows the agencies themselves to make the request of the court. Do you envision the grand jury as an extension and under the regulation of the court or the prosecution? Which entity would you charge with the responsibility of seeing that the criminal prosecution is conducted properly and who is responsible for seeing that grand jury secrecy is maintained?

Answer.

A grand jury, in this case, a Federal grand jury, is summoned by the Federal district court to hear accusations and complaints in criminal matters, hear the evidence adduced by the government's prosecutor and find bills of indictment where the members determine that a criminal trial ought to be held. The grand jury itself, within constitutional and statutory limits, necessarily operates independently of the prosecutor and/or judge. These constitutional and statutory limits are, of course, ultimately enforced by the court, e.g., a knowing violation of the secrecy requirements of Rule 6 of the Federal Rules of Criminal Procedure may be punished as a contempt of court. Perforce, however, the prosecutor's functional relationship with the grand jury and his own duties and responsibilities under law and as an officer of the court require that he take an aggressive and active role in seeing that criminal prosecution is conducted properly and in seeing that grand jury secrecy is maintained.

2. Question:
   Congress has traditionally placed constraints on the Government's civil and administrative discovery and investigative authority. Do you believe that this legislation would allow Government authorities to circumvent these statutory constraints? Do you believe the court should afford great consideration to these constraints in considering whether to issue a Rule 6 (e)(c) disclosure order?

Answer.

No, I do not believe that this legislation would allow Government authorities to circumvent statutory constraints on their civil and administrative discovery and investigative authority. Rather, I believe the provisions of S. 1676 contain safeguards to prevent and detect any such circumvention. The primary concern here, of course, is abuse of the grand jury process, i.e., deliberate use of the grand jury for civil discovery purposes. S. 1676, by requiring a court order to authorize disclosure of grand jury material to persons in agencies and departments other than the Department of Justice, for civil and administrative purposes, provides ample opportunity for the court to police the matter and ensure that any such misuse of the grand jury will be properly punished.

The court, in applying the "substantial need" test to the Department of Justice's request for authorization to disclose grand jury information to persons in another agency, will, no doubt, consider a number of factors such as the public interest in disclosure, etc. In addition to those kinds of factors, I am confident that the court will, in each such case of a request for disclosure, scrutinize any suggestion that the grand jury has been abused or that such request for disclosure is an attempt to circumvent a statutory constraint on the Government's civil and administrative discovery or investigative authority.

Senate Judiciary Committee
November 19, 1985

Questions submitted by Senator Arlen Specter

Answers thereto, submitted by James R. Richards, Inspector General, U.S. Department of Energy

1. Question:
   What is your view regarding the bill's definition for access?

Answer.

The provisions of S. 1676 for disclosure will overcome the impediments caused by the Sells (United States v. Sells Engineering, Inc., 103 S. Ct. 3133 (1983)) and Baggot (United States v. Baggot, 103 S. Ct. 3164 (1983)) decisions to the Government's ability to pursue non-criminal remedies. This bill is of special importance to the statutory Inspectors General as we conduct criminal, civil, and administrative audits and investigations in our efforts to prevent and detect waste, fraud, and abuse in our respective departments and agencies. Further, provision for disclosure to agencies other than the Department of Justice is of particular importance to us. We believe that disclosure of grand jury information to the agencies under appropriate circumstances as determined by the Federal courts under the provision of this bill will obviate the necessity of costly, time-consuming duplicative audits and investigations by our offices. This will be a great help in our continuing efforts to more efficiently and effectively use our limited resources in our battle to detect fraud and other wrongdoing against the Government.

We also believe that the bill contains more than adequate safeguards to preserve the secrecy requirements long associated with the grand jury process. The bill's provisions are not intended to allow the grand jury process to be used for civil investigations or to allow agencies to circumvent the statutory constraints on civil and administrative discovery and investigative authority. The bill's safeguards, such as the requirement for a court order for disclosure to agencies other than the Department of Justice, gives ample opportunity to the Federal courts to police the strictures of Rule 6 (e) and to apply sanctions where necessary.

2. Question:
What is your opinion regarding the effect on witnesses who count on secrecy in coming forward of the exchange of information among agencies? Do you feel that the absence of civil immunity will have a chilling effect on witnesses?

Answer.

No evidence has been presented to date nor is there anything in S. 1676 that indicates any lessening of the long-held commitment to the policy interests served by the rules on grand jury secrecy, including, but not limited to, the confidentiality of witnesses who voluntarily testify before the grand jury. There is no reason to believe, and, indeed, the Supreme Court did not refer to any evidence that potential witnesses had hesitated to come forward to testify before the grand jury prior to the Sells decision. As a practical matter, any expectation of secrecy of grand jury witnesses usually ends with the return of indictments and the onset of a criminal trial. Based on experience prior to the Sells decision and the language of the proposed legislation, there is no expectation that disclosure to agencies by court order would occur prior to the return of indictments. Most likely, the courts would not allow disclosure to occur prior to the conclusion of the criminal trial. Furthermore, there is nothing in this bill and no evidence presented elsewhere that indicates that Government personnel, most likely attorneys, agency investigators and auditors, would not closely hold the disclosed information, protecting legitimate interests in confidentiality and privacy. Experience shows and the bill's provisions contemplate that the information will be used or further disclosed by the agencies only in appropriate circumstances to serve important public interests, such as civil or administrative proceedings to recover Government funds from those who fraudulently or otherwise wrongfully obtained such monies.

The CHAIRMAN. Some authorities contend that allowing unfettered or easy access to grand jury information for civil and administrative proceedings would chill the open participation of grand jury witnesses if the information they could provide would be the basis for subsequent civil or administrative sanctions against them.

Is this a problem, and what problems do you foresee in granting sweeping immunity against prosecution or suit, and would the witnesses participate knowing they are only immunized against criminal prosecution but not civil?

Mr. RICHARDS. I can only respond based on my experience as a former Federal prosecutor, both as an assistant U.S. attorney in a small U.S. attorney's office in Denver and chief of an organized crime strike force in Buffalo, NY.

I cannot recall—and these, of course, were well prior to these decisions that we are talking about today—I cannot recall that there was any substantial problem with, for instance, witnesses being reluctant to testify before the grand jury, except in organized crime cases. There was always that fear because of the nature of the people that they were testifying against.

But the Government must take adequate steps even to the extent of using the Federal witness protection system to protect those witnesses. I think there is a strong commitment, and there always has been, on behalf of the Government to protect witnesses who come forward to testify at the grand jury or at trial.

Oftentimes, grand jury witnesses also have to testify at a trial where their identity and their testimony does become known. I think the grand jury process and the secrecy process acts to protect against premature, unauthorized, or inadvertent disclosure which might unfairly besmirch the reputation of an otherwise innocent person. It also protects against disclosure to a putative defendant of evidence that the Government has against him that might influence him to try to alter or destroy evidence or to intimidate witnesses.

The Chairman. Mr. Richards, some contend that the risk of fishing expeditions—the random search for criminal, civil, or administrative violations—would be curtailed if disclosure to noncriminal division attorneys and personnel were not allowed, or allowed only after a showing of particularlized need.

Both pieces of legislation contain language that would reduce the showing to one of substantial need. Does this create a greater risk of Government fishing expeditions, and how would an outside agency or civil division attorney argue for information with any degree of particularity when the information is in the sole possession and control of criminal prosecutors?

Mr. Richards. I think that one of the deterrents to fishing expeditions, of course, is resort to the courts. The courts are always there to, in effect, deter and punish or contain people who occasionally would abuse the process.

I think there are adequate safeguards in the bill to guard against abuse of the grand jury process. After all, what we are dealing here with is a commonsense approach that I believe most of the people in this country view as what we ought to be doing to detect and deter crime.

I think there are some commonsense approaches in substantial need. Substantial need is still a pretty stiff test, but particularlized need, the way the definition of it has been restricted, seems to keep from legitimate reach for civil and administrative purposes even the most innocent of information, even after the purposes for which a grand jury was empaneled have expired.

The Chairman. All right, Mr. Richards, thank you very much for your appearance here.

Mr. Richards. Thank you, Mr. Chairman.

The Chairman. James Hamilton, will you come around? Mr. Hamilton, you may proceed. If you can summarize in 5 minutes and then we will ask you questions, we can put your entire statement in the record.

STATEMENT OF JAMES HAMILTON, ATTORNEY, GINSBURG, FELDMAN & BRESS, WASHINGTON, DC

Mr. Hamilton. Thank you, Mr. Chairman. Mr. Chairman, you have invited me to testify concerning a proposal that would give congressional committees access to grand jury materials in some circumstances.

By way of background, I have written a book and numerous articles on Congress' access to information, and have testified before Congress on various occasions regarding this topic.

As you may recall, Mr. Chairman, I am also a South Carolina native, which is perhaps my chief qualification.

The CHAIRMAN. Well, that is a pretty good qualification.

Mr. HAMILTON. The current bill, S. 1562, has been introduced because rule 6(e) of the Federal Rules of Criminal Procedure generally prevents Congress from obtaining grand jury materials.

The issue of whether Congress should have access to grand jury materials presents a conflict of fundamental principles and values. On the one hand, there is Congress' sweeping constitutional power to investigate, which the Supreme Court repeatedly has affirmed.

This power includes the right to investigate the administration of the Federal criminal laws by the executive branch.

On the other hand, the need for grand jury secrecy is well recognized. For example, grand jury secrecy may be required to prevent the escape of persons who may be indicted, to promote open grand jury discussion and deliberation, to prevent tampering with grand jury witnesses who later may testify at trial, to promote full disclosure by grand jury witnesses, and to protect persons later exonerated.

It is not easy to harmonize Congress' wide powers of investigation and requirements for information with the grand jury's requirements for secrecy. Frankly, Mr. Chairman, the problem results in part because Congress has not been exemplary in keeping confidential information confidential.

Senator Howard Baker said that the Senate Watergate Committee, which I served as counsel, had elevated leaking to an art form. The joke during Watergate was that, if a certain committee member's Xerox machine malfunctioned, the entire Capitol Hill press corps would go out of business.

Nonetheless, I believe that in very limited circumstances Congress should have access to grand jury materials. But any amendment to rule 6(e) should seek to ensure that the congressional bodies receiving grand jury materials will handle them with propriety.

While numerous courts have assumed that committees will deal properly with confidential information, I would not leave this matter to chance regarding grand jury materials, which are especially sensitive.

We all know, Mr. Chairman, that different Members of Congress have different agendas, constituencies and methods of operation.

Any amendment to rule 6(e) should instruct a Federal court to weigh congressional needs against grand jury secrecy requirements in determining whether to grant access. As the statute or legislative history should make clear, the court, in particular, should consider several factors.

First, the court should ascertain whether the committee actually needs grand jury material to perform its legislative missions, or whether it could acquire sufficient information from nongrand jury sources.

The fact that an entire House by a special resolution has affirmed a committee's need for material should be quite persuasive to a court. By contrast, the failure to pass such a resolution would be a signal to a court that the material is not necessary for the committee's mission.

Second, a court should consider whether or not a committee seeking information, or its parent House, has in place special provisions to protect the confidentiality of grand jury material.

Provisions that include sanctions against members or staff who violate confidentiality requirements should be especially convincing to a court.

Third, a court normally should be far more inclined to release grand jury material after the grand jury's work is completed. Release prior to completion might present, among other things, the risk of improper interference by members or staff with grand jury deliberations.

None of these three factors, Mr. Chairman, is meant to be dispositive concerning the access issue, nor does this list exhaust the relevant considerations. For example, the protection of informants and the risk that persons under investigation may flee if they catch wind of the grand jury's work are other factors that should be considered. But the three factors mentioned have unique relevance to congressional requests.

In sum, Mr. Chairman, because of Congress' broad investigative powers and its need for information, I believe that Congress' access to grand jury materials should not be totally foreclosed. However, the occasions of access should be limited and subject to strict court review.

S. 1562, as now written, does not appear adequate to provide sufficient protections for grand jury materials. The bill could be read to give a committee access to grand jury materials once a substantial need is shown, even if the materials are extremely sensitive and there are powerful arguments against release.

In my view, a court should be given authority to weigh the competing interests involved and instructed to consider the factors I have discussed.

Mr. Chairman, I will be pleased to answer any questions that you may have.

The CHAIRMAN. Thank you. Incidentally, are you from Chester?

Mr. HAMILTON. Yes, sir.

The CHAIRMAN. Who was your father?

Mr. HAMILTON. My father was Herman Hamilton, who, as you may recall, died last year, Mr. Chairman.

The CHAIRMAN. A good friend of mine.

Mr. HAMILTON. Well, he was a supporter and an admirer of yours, Mr. Chairman.

The CHAIRMAN. And your mother, too. You come from good stock.

Mr. HAMILTON. Thank you, sir.

The CHAIRMAN. Can you supply this committee with any examples, other than impeachment proceedings, where a congressional committee in carrying out its legitimate investigative and oversight responsibilities would require access to secret grand jury materials?

Mr. HAMILTON. Mr. Chairman, your counsel asked me that before the hearing began this morning, and the only case that I know of where grand jury materials—that is, materials indicating what has occurred before the grand jury—the only case I know of where this material has been given is the impeachment situation during Watergate.

Now, there are other situations where documents that the grand jury had reviewed were given, but the production of these documents in those situations did not inform the committee what had occurred before the grand jury, and I think that is a significant distinction.

The CHAIRMAN. What sanctions, in addition to the present contempt of court sanctions, could be imposed upon members of Congress or their staff for the unauthorized disclosure of grand jury materials, and could the person who discloses damaging information be subject to personal liability and should punitive damages be allowed?

Mr. HAMILTON. Mr. Chairman, in terms of the sanctions, I think the sanctions would have to come from the Congress, from the Senate or the House. I think that the Senate, for example, could pass a rule that would subject members who leak confidential material to reprimand by the Senate. Certainly, staff members violating secrecy rules could be expelled from their positions of employment.

I think if stringent sanctions were in place, the instances of serious leaking would quickly decrease. In terms of civil liability, as you know, Mr. Chairman, the speech or debate clause protects Congressmen and their staffs when Congressmen and staffs are acting in a legislative capacity.

There is a serious question of whether leaking would be considered to be acting in a legislative capacity. If not, then someone doing the leaking could be subjected to civil liability if there is some substantive offense involved like invasion of privacy or libel or something like that.

That is a difficult question. It is not one that has been decided by the courts.

The CHAIRMAN. Could you estimate in your years as an expert on the matter of congressional access to information how many times congressional committees have successfully obtained access to secret grand jury materials?

Mr. HAMILTON. Well, the only one that I know of, Mr. Chairman, is the one example that I gave concerning the Judiciary Committee of the House during the Nixon impeachment inquiry.

The CHAIRMAN. I think that is all the questions I have. We have some questions by Mr. Grassley and maybe some others to be submitted to you, if you would kindly answer those for the record.

Mr. HAMILTON. That would be fine, Mr. Chairman.

[Aforementioned follows:]

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November 27, 1985

BY HAND

Michael Wootten, Esq.
Counsel
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mike:

This letter responds to the questions from Senators Arlen Specter and Charles Grassley that you submitted to me. For convenience, I will repeat the questions.

REPLIES TO QUESTIONS FROM SENATOR ARLEN SPECTER

1. What is your view regarding the bill's definition for access?

I assume this question seeks my views as to the standard in S. 1562 for access to grand jury materials by Congress. As I said in my testimony, I believe the bill's standard is inadequate. The bill could be read to allow access merely upon a showing that a committee had "substantial need" for grand jury materials, without any consideration of grand jury secrecy requirements. The bill should allow a court to weigh congressional needs against grand jury secrecy requirements. The court should be instructed to take into particular account the three principal factors mentioned in my testimony:

(1) whether the committee's parent house by resolution has affirmed the committee's need for grand jury information;

(2) whether the committee, or its parent house, has

in place special rules to protect the confidentiality of grand jury materials; and

(3) whether the grand jury has completed its work.

2. Do you feel that Congressional committees should be accorded a more relaxed standard to obtain access to grand jury materials?

No. As my testimony and the previous answer indicate, I think the standard should be more rigorous than that set forth in S. 1562.

3. What is your opinion regarding the effect on witnesses who count on secrecy in coming forward of the exchange of information among agencies? Do you feel that the absence of civil immunity will have a chilling effect on witnesses?

It is difficult to answer this question in the abstract. Different witnesses will react in different ways. As a general matter, it likely is true that witnesses who fear civil or administrative proceedings would be concerned that their grand jury testimony in some way might be used against them in such proceedings. Whether such fears would produce false or incomplete testimony is difficult to say. The outcome would depend upon a particular witness' regard for truth, his or her fear of a perjury prosecution, the skill of the prosecutors in asking questions, the witness' acumen in answering them, and a variety of other factors.

REPLIES TO QUESTIONS FROM SENATOR CHARLES GRASSLEY

1. You state in your testimony that you believe Congress should have access to grand jury materials, but in very limited circumstances. What language do you think should be added to the current draft of S. 1562 to provide both adequate safeguarding of grand jury materials and still preserve the ability of congressional committees in certain circumstances the option of making reference to grand jury materials? What language would need to be added to the legislation or to legislative history which would clarify that the courts should employ a balancing analysis?

The bill or its legislative history should contain the following language:

> Disclosure of matters occurring before the grand jury, otherwise prohibited by

> this rule, may also be made when so directed by a court upon a showing of substantial need by a committee of Congress, and after weighing the committee's need against the need for grand jury secrecy. In weighing a committee's need for information against the need for grand jury secrecy, the court should consider the following factors:
>
> (1) whether the committee's parent house has affirmed the committee's need for grand jury materials by a special resolution;
>
> (2) whether the committee, or its parent house, has in place special rules that will appropriately protect the confidentiality of grand jury materials;
>
> (3) whether the grand jury has completed its work regarding the matter about which inquiry is made; and
>
> (4) any other factors demonstrating the committee's need for access or the need for secrecy of the grand jury materials at issue.

2. You also mention in your testimony that some of the problems surrounding this issue arise from the Legislative Branch's reputation for "leaking". To your knowledge, is there any evidence that Congress has participated in more so-called "leaking" than the Executive Branch? When strict procedures are observed, as with the receipt of intelligence information by the Intelligence committees, have there been any instances of harmful "leaks"?

It is certainly true that executive branch officials engage in a great deal of "leaking". It would be difficult to determine whether that branch's conduct in this regard rivals, or is worse than, Congress'. My general impression, however, is that grand jury materials generally are fairly well protected, perhaps because violations of Rule 6(e), Federal

Rules of Criminal Procedure, could result in onerous sanctions. My recollection is that, during the congressional investigations of the intelligence agencies in the mid-1970's there were some fairly serious leaks. For example, the House committee's report was leaked to the Village Voice. My impression -- I do not claim specific knowledge -- is that, despite CIA Director Casey's recent comments, the present Senate and House intelligence committees do a reasonably good job of protecting the secret information they obtain. This in part may be due to the fact that the rules of those committees contain tough, specific restrictions on release of confidential information. I have proposed that, in deciding whether to grant access to grand jury materials, a court should consider whether or not a committee desiring access, or its parent houses, has adopted similar stringent rules to protect grand jury materials.

3. You have obviously had past experience with Executive Branch "cover-ups". Do you believe that the fear of potentially harmful "leaks" by Congress is balanced out by the Executive Branch's propensity for "covering up" its operations?

Access to grand jury materials might be needed most where there is evidence that executive branch officials are attempting to cover up the commission of crimes or otherwise are engaging in wrongdoing. Fortunately, such episodes have appeared infrequently in our history, but they do occur and thus the need for vigilant congressional oversight. My recommmendation that Congress be given limited access to grand jury materials is largely intended to ensure that Congress can obtain materials needed to perform its oversight functions in such unfortunate circumstances.

4. Opponents of congressional access to grand jury information have charged that such access could be unconstitutional in that access would violate the Separation of Powers Doctrine. Do you think granting a congressional committee access to certain grand jury materials is unconstitutional when that committee is pursuing information which falls within its oversight jurisdiction?

In my view, a bill that would allow a court to provide grand jury materials to a congressional committee with legitimate oversight functions would not violate separation of powers principles. As the Supreme Court said in Buckley v. Valeo, 424 U.S. 1, 138 (1976), the executive branch, not Congress, has the authority to execute the laws. A congressional committee could not assume control of a grand jury or direct its efforts. However, Congress has constitutional authority to oversee the administration of the criminal laws by the other two branches, and in so doing has a constitutional right to investigate the workings of grand juries. See, e.g., Watkins v. United States, 354 U.S. 178, 187 (1957); McGrain v. Dougherty, 273 U.S. 135 (1927).

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I hope these answers prove useful to the Committee.

Best regards,

James Hamilton

The **Chairman**. Thank you very much for your appearance.

Mr. **Hamilton**. Thank you, sir.

[The prepared statement follows:]

TESTIMONY OF JAMES HAMILTON 1/ REGARDING CONGRESSIONAL ACCESS TO GRAND JURY MATERIALS BEFORE THE SENATE COMMITTEE ON THE JUDICIARY, NOVEMBER 19, 1985

Mr. Chairman, Members of the Committee, you have invited me to testify concerning a proposal that would give congressional committees access to grand jury materials in some circumstances. By way of background, I have written a book 2/ and numerous articles 3/ on Congress' access to information, and have testified before Congress on various occasions regarding this topic.4/

The current bill, S.1562, has been introduced because Rule 6(e), Federal Rules of Criminal Procedure, generally prevents Congress from obtaining grand jury materials.5/ However, Congress may be able to gain access to such materials for use in a quasi-judicial proceeding such as an impeachment inquiry.6/

1/ Member, Ginsburg, Feldman and Bress, Chartered, Washington, D.C.; formerly Assistant Chief Counsel, Senate Watergate Committee.

2/ The Power to Probe: A Study of Congressional Investigations, Random House 1976, Vintage Books 1977.

3/ E.g., A Legislative Proposal For Resolving Executive Privilege Disputes Precipitated By Congressional Subpoenas, 21 Harvard Journal on Legislation 145 (Winter 1984) (with John C. Grabow).

4/ E.g., Testimony Concerning Executive Privilege during "Contempt of Congress" Hearing before the Subcommittee on Oversight and Investigations of the House Energy and Commerce Committee, Serial No. 89, 97th Congress, November 19, 1981.

5/ E.g., In re Grand Jury Investigation of Uranium Industry, 1979-2 Trade Cases, ¶ 62,792 at 78,639 (D.D.C. 1979).

6/ Compare In re Grand Jury Investigation of Uranium Industry, 1979-2 Trade Cases ¶62,792 at 78,644 (D.D.C. 1979) with In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to The House of Representatives, 370 F. Supp. 1219 (D.D.C. 1974), petitions denied, Haldeman v. Sirica, 501 F.2d 714 (D.C. Cir. 1974).

The question whether Congress in other circumstances should have access to grand jury materials presents a conflict of fundamental principles and values.

On the one hand, there is Congress' sweeping constitutional power to investigate. As the Supreme Court has said:

> That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.7/

This power includes the authority to investigate the administration of the federal criminal laws by the executive branch.8/

On the other hand, the need for grand jury secrecy is well recognized. For example, grand jury secrecy may be required

(1) To prevent the escape of persons who may be indicted;

(2) To promote open grand jury discussion and deliberation;

(3) To prevent tampering with grand jury witnesses who later may testify at trial;

(4) To promote full disclosure; and

(5) To protect persons later exonerated.

It is not easy to harmonize Congress' wide powers of investigation and requirements for information with the grand jury's need for secrecy. Frankly, Mr. Chairman, the problem results in part because Congress has not been exemplary in keeping confidential information confidential. Senator Howard Baker said that the Senate Watergate Committee, which I served, elevated leaking to an "art form". The joke during Watergate

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7/ Watkins v. United States, 354 U.S. 178, 187 (1957); see also Barenblatt v. United States, 360 U.S. 109, 111 (1959).

8/ E.g., McGrain v. Daugherty, 273 U.S. 135 (1927).

was that, if a certain Committee Member's xerox machine malfunctioned, the entire Capitol Hill press corp would go out of business.

Nonetheless, I believe that, in very limited circumstances, Congress should have access to grand jury materials. But any amendment to Rule 6(e) should seek to ensure that the congressional bodies receiving grand jury materials will handle them with propriety. While numerous courts have assumed that committees will deal properly with confidential information,[9/] I would not leave this matter to chance regarding grand jury materials, which are particularly sensitive. We all know, Mr. Chairman, that different Members of Congress have different agendas, constituencies, and methods of operation.

Any amendment to Rule 6(e) should instruct a federal court to weigh congressional needs against grand jury secrecy requirements in determining whether to grant access. As the statute or legislative history should make clear, the court in particular should consider several factors.

First, the court should ascertain whether the committee involved actually needs grand jury material to perform its legislative missions, or whether it could acquire sufficient information from non-grand jury sources. The fact an entire house, by special resolution, has affirmed a committee's need for material should be particularly persuasive to a court. By contrast, the failure to pass such a resolution would be a

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[9/] E.g., Exxon Corp. v. Federal Trade Commission, 589 F.2d 582 (D.C. Cir. 1978), cert. denied, 441 U.S. 943 (1979); Ashland Oil, Inc. v. Federal Trade Commission, 409 F. Supp. 297, 308 (D.D.C. 1976), aff'd, 548 F.2d 977, 979 (D.C. Cir. 1976); Ansara v. Eastland, 442 F.2d 751, 754 (D.C. Cir. 1974); In re Grand Jury Investigation of Uranium Industry, 1979-2 Trade Cases ¶ 62,792 at 78,644 (D.D.C. 1979); In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to The House of Representatives, 370 F. Supp. 1219, 1230 (D.D.C. 1974), petitions denied, Haldeman v. Sirica, 501 F.2d 714 (D.C. Cir. 1974).

signal to a court that the material is not necessary for the committee's mission.

Second, a court should consider whether or not a committee seeking information, or its parent house, has in place special provisions to protect the confidentiality of grand jury materials. Provisions including sanctions against Members or staff who violate confidentiality requirements should be especially convincing to a court. (However, instances may arise where a committee, in the exercise of Congress' informing function, finds it necessary, after following proper procedures, to make public reference to grand jury materials.)

Third, a court normally should be far more inclined to release grand jury materials after the grand jury's work is completed. Release prior to completion might present, among other things, the risk of improper interference by Members or staff with grand jury deliberations.

None of these three factors is meant to be dispositive concerning the access issue, nor does this list exhaust the relevant considerations. For example, the protection of informants, and the risk that persons under investigation may flee if they catch wind of the grand jury's work, are other factors that should be considered. But the three factors mentioned have special relevance to congressional requests.

In sum, Mr. Chairman, because of Congress' broad investigative powers and its need for information, I believe Congress' access to grand jury materials should not be totally foreclosed. However, the occasions of access should be limited and subject to strict court review.

S. 1562, as now written, does not appear adequate to provide sufficient protection for grand jury materials. The bill could be read to give a committee access to grand jury materials once a "substantial need" is shown, even if the materials are particularly sensitive and there are powerful arguments against release. In my view a court should be given authority to weigh the completing interests involved and instructed to consider the factors I have discussed.

Mr. Chairman, I will be pleased to answer any questions you or the Committee may have.

Senator **LAXALT** [presiding]. The chairman has other commitments, so you will have to suffer with me for a while now.

The next witness is Peter Vaira. Did I pronounce that correctly, sir?

Mr. **VAIRA**. Yes, sir.

Senator **LAXALT**. Will you please step forward, Mr. Vaira?

Mr. Vaira is vice chairman of the Grand Jury Committee, section of criminal justice, ABA, based here in Washington. Welcome.

Mr. **VAIRA**. Thank you, sir.

Senator **LAXALT**. We also have Alan C. Brown, who is a member of the ABA section of public contract law. Mr. Brown, welcome.

Mr. **BROWN**. Thank you, Senator.

Senator **LAXALT**. Proceed in any manner that you wish—oh, excuse me; Mr. Russell is supposed to be part of this panel. I am sorry about that. We have David W. Russell, president of the National Association of Criminal Defense Lawyers, also based here in Washington.

Mr. **RUSSELL**. Thank you, Senator.

Senator **LAXALT**. Please proceed.

STATEMENT OF A PANEL CONSISTING OF PETER F. VAIRA, VICE CHAIRMAN, GRAND JURY COMMITTEE, SECTION OF CRIMINAL JUSTICE, AMERICAN BAR ASSOCIATION, WASHINGTON, DC, ACCOMPANIED BY ALAN C. BROWN, MEMBER, SECTION OF PUBLIC CONTRACT LAW, AMERICAN BAR ASSOCIATION; AND DAVID W. RUSSELL, PRESIDENT, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, WASHINGTON, DC

Mr. **VAIRA**. We appear, Senator, at the request of William W. Falsgraf, who is president of the ABA, to express the association's views on the issue of access to grand jury materials as proposed in S. 1676 and section 5 of S. 1562.

By way of short introduction, I was a prosecutor a long time, over 15 years, with the Department of Justice. I served as the head of the Philadelphia and Chicago strike forces on organized crime. And from 1978 to 1983, I was the U.S. attorney for the eastern district of Pennsylvania, which includes Philadelphia. I am currently a partner in the Chicago law firm of Lord, Bissell and Brook. I practice almost exclusively in the white-collar field and I write and lecture on this subject a lot.

The ABA is concerned that these two bills will cause the grand jury to depart from its traditional role of ferreting out crime, instead causing it to be used to gather information for civil and administrative agencies of the United States.

In 1982, the American Bar Association filed an amicus curiae brief in *United States* v. *Sells Engineering,* supporting the view that Justice Department attorneys need a court order to get access to grand jury material and they must show particularized need to do so.

As you know, this particular pending legislation would overturn that court's decision.

The historic purpose of the grand jury is to protect citizens against unfounded accusations either by private persons or by the Government. Now, in order to ferret out crime and to find the truth of those accusations, the grand jury has been given broad, broad, sweeping powers of investigation.

No other institution in our legal system has as much power to subpoena and examine information and subpoena persons. The courts, because of this, have accorded the grand jury these powers because of the Government's need to ferret out crime in a quick and prompt manner.

Due process rights which are accorded in other proceedings, such as in civil proceedings or other criminal proceedings, are simply not afforded in grand jury investigations.

For example, the right to counsel, the right to know one's accusers, to cross-examination, and indeed the right to see one's own testimony in a transcript are denied because the courts feel that the grand jury should have these sweeping powers.

These two bills under consideration would allow the Government to use the grand jury's great and sweeping investigative powers without any of the due process protections that go with it to aid civil agencies in litigation against those targeted by the grand jury—civil agencies which have their own power and their own procedures to do it anyway. This would be a misuse of the grand jury, a use which the framers of the Constitution never intended.

With so many crimes today having attendant civil remedies, such as multiple damages to be assessed, debarment from doing business with the Government, the thrust of the investigation of these complicated crimes could easily, easily become civil.

In reality, these cases are very, very complicated, often too complicated to be fully dealt with by a grand jury. The tendency will be to subpoena all documents before the grand jury, use the grand jury to compel immunized testimony of certain key witnesses, and then turn the documents over to agents of the civil agency to work up a civil case.

Large fraud cases could easily end up being brought as simply civil cases. How could this be accomplished? By simply demonstrating to a court that the information subpoenaed had disclosed that large amounts of money were due and owing to the United States.

I think that that simply showing would most likely satisfy the term "substantial need."

The tendency, I am afraid, would be to use the grand jury more frequently in order to effect wholesale disclosure. There is much historical precedent for this. Witness the increased use of the grand jury in IRS tax cases. In 1972, there hardly was any use of that.

I myself began to use the grand jury in 1972 for tax cases when I was in the department, and after that we saw a proliferation of the use of the grand jury to get information and get documents.

Senator LAXALT. Was that a method of discovery that was not otherwise available? Is that the theory?

Mr. VAIRA. Yes, sir; yes, sir. The IRS has its own subpoena powers—summons powers, I should say—and they have their own system of getting information. In order to short-cut that and in order to move quickly, the department began to use the grand jury—what they would call a special tax grand jury.

The courts had long, long been very reluctant to give them that power. There is a signal case out of the seventh circuit called In Re: April 1956 Grand Jury—a citation I will supply to the committee later. (In re April 1956 Grand Jury, 239 F.2d 263 (7th Cir. 1956).)

It is a signal case saying simply that the grand jury has no business being used for these civil purposes. You have the IRS; it has its ability to get the information and it should go out and get it.

Senator LAXALT. You worked over in Justice for a number of years. Why do you think they are attempting to secure this relief on the civil side?

Mr. VAIRA. Quite frankly, I think it is an attempt to have the grand jury be all things to all men. It is an attempt to say, look, there is a lot of information out there; if we can use and get it, then we could turn it over wholesale to the investigating agencies, especially the inspectors general.

The inspectors general, if they need manpower and if they need information—well, give them the manpower to get it. But it is just an easy way; it is very tempting.

The grand jury is a powerful tool that does not exist any place else in our Government, and it is a great temptation to say, let us sweep away all these other safeguards, all the other procedures that you go through to get that information.

And then it is easy to say, as I have heard the inspector general, who is an old friend of mine, from Energy here this morning say, well, it is there; all this taxable money, all this fraud is benefiting these persons; why not simply turn it over?

Senator LAXALT. When you were with Justice, was there any thinking along these lines or was that just some kind of aspiration that was fondly hoped for?

Mr. VAIRA. I think it was an aspiration fondly hoped for, Senator.

Senator LAXALT. It was not deemed on a policy basis to be a realistic aim through legislation here in the Congress?

Mr. VAIRA. No, no.

Senator **Laxalt**. When did this come into fruition? I am new to this issue, very frankly, and it is apparent from my questions, but what triggered coming here for this kind of legislation?

Mr. **Vaira**. The Supreme Court, in *United States* v. *Sells* and another case, *United States* v. *Baggot,* prohibited the Government, the attorneys who work criminal cases, from turning over, without getting an order from a court, to civil agencies and to the IRS material that they had gotten in a criminal investigation.

Senator **Laxalt**. Did that change the existing situation?

Mr. **Vaira**. I do not think so at all. Contrary to what I have heard this morning, that did not change the existing situation. There was never any massive turnover. I think the great temptation has been caused by just the decision in *Sells* and the growing power of the inspectors general, who do a lot of work in this fraud, waste and abuse area, saying this is ridiculous. Look at *Sells*; *Sells* is stopping us. We ought to have this information.

If we look at the historical record, long before *Sells* and *Baggot* the law was as it is today. If the Government needed information, it could get it. I heard a question this morning. The chairman said, well, can you give us a situation where an agency has had to start from scratch and completely redo an investigation.

My answer to that is if that is the case, then that is an awfully poor investigation. An awfully poor agency would have to do that because, realistically, prosecutors do not do the investigation; agents from those various agencies do it themselves and they bring it to the prosecutor and the prosecutor then works it up.

Those agencies have that workup to start with. All they are looking for is a windfall.

Senator **Laxalt**. Yes. Is the thrust of this, to your knowledge, coming principally from the inspectors general?

Mr. **Vaira**. That is hard to say, Senator.

Senator **Laxalt**. You do not know, then?

Mr. **Vaira**. I do not know that.

Senator **Laxalt**. And presently do you know what the policy position is within Justice in connection with this whole issue? It is my understanding that Justice currently, at least the Civil Division, embraces this legislation.

Mr. **Vaira**. I am sure they embrace this legislation. I think one of the mistakes the Department of Justice has made is that the argument they used is what if we had a small U.S. attorney's office, or only five or six assistants—and that is quite a few U.S. attorneys' offices across the country—and what if one person works a criminal case and then wants to bring a civil action? He is hamstrung.

My answer to that is they should have taken that back to the courts, taken a case like that and gotten it litigated. And I am sure that the Supreme Court would have taken care of that.

Senator **Laxalt**. You mean in terms of entering an appropriate order?

Mr. **Vaira**. Yes. They would have fashioned a remedy. The department did not, but wants to come in and use this as an attempt to make a wholesale sweep.

Another factor that the Department does not mention——

Senator LAXALT. If I may, before you proceed to that next point, looking at it from Justice's side, they argue what, efficiency?

Mr. VAIRA. Efficiency.

Senator LAXALT. Economy?

Mr. VAIRA. Efficiency and economy and a great misuse of money.

Senator LAXALT. Why duplicate the process if this is all going to be or could be developed in the grand jury process? Why should we have a parallel investigative route?

Mr. VAIRA. That is correct.

Senator LAXALT. Is that essentially their position?

Mr. VAIRA. That is it, sir.

Senator LAXALT. And your contention is that since the grand jury powers are so broad, it would be very dangerous to permit this power to be used in the civil area?

Mr. VAIRA. Senator, I wish I would have put it as well as you have. That is very good.

A very practical aspect of this is that, as I have said, the grand jury has all these broad, sweeping powers, and the courts have gone out of their way to protect these powers and to protect the Government's ability to ferret out crime.

However, once the courts realize that this is going to be a civil proceeding and once they realize this is going to be used for wholesale civil production, the courts will then treat the grand jury as a civil institution.

They have discretion to do a lot of things. The courts can give out copies of witnesses' transcripts. Grand jury material can be disclosed to targets at crucial times before the indictment.

They can easily turn over the prosecutor's remarks to the grand jury, his advice on the law, and this will spawn lengthy litigation at a crucial time. What I am saying is that this may be the start of killing the goose that laid the golden eggs.

The grand jury is an effective method of ferreting out crime, but it should not be used to make civil cases. And the courts will realize that and you will begin to see the downfall of what I think is a powerful institution and ought to be protected.

Senator LAXALT. Let me ask you this. The contention that has been made by Justice, and you have already alluded to it, is cost efficiency. If they are not permitted to have access to grand jury materials and they do not have the resources, particularly in smaller offices, to gather the information, do you think that meritorious civil actions should go down the tubes as a result, as a matter of policy?

Mr. VAIRA. No; I do not. In fact, what the department has not addressed is that the Supreme Court itself, in *Sells,* said that the showing of particularized need should be much easier on the part of the Government; there should be a lesser standard for them.

Particularized need could be shown much easier and this problem could be gotten around. I think that the department is simply crying wolf much too early and using the argument of collecting moneys due the Government by proposing this bill.

I do not think there ever was a problem before the *Sells* decision and there is not now.

Senator LAXALT. So what you are saying essentially is that a civil case need not be sacrificed; all they would have to do is go to court and make an appropriate showing. And if it was deemed meritorious, they could get an order.

Mr. VAIRA. That is correct, sir.

Senator LAXALT. Is that what you are saying?

Mr. VAIRA. That is exactly right.

Senator LAXALT. I have a question that has just been submitted to me and I will ask it on behalf of the chairman. Some contend that the risk of fishing expeditions and the random search for criminal, civil, and administrative violations would be curtailed if disclosure to non-Criminal Division attorneys and personnel were not allowed, or were allowed only after a showing of particularized need.

Both pieces of legislation contain language that would reduce the showing to be one of substantial need. Now, does this create a greater risk of Government fishing expeditions, in your estimation?

Mr. VAIRA. Senator, I do not think there has ever been any fishing expeditions. In my time inside the Department, I never thought that was a problem. I do think that using the term "substantial need" does raise problems.

I cannot foresee that. I think it should remain particularized need, for this reason: The courts have interpreted particularized need to mean that we are only going to show you as much of this information as you need, and tell us what you need.

That is why the term "particularized need" is better than substantial need. But I have never seen any fishing expeditions. I think that is a ghost that is in the wind and I do not think that is a problem.

Senator LAXALT. Let me ask you this. How would an outside agency or Civil Division attorney argue for the information with any degree of particularity when the information is in the sole possession and control of the criminal prosecutor? Is that worked out as a matter of comity, or what?

Mr. VAIRA. That question simply misstates the facts. As I said earlier, a criminal prosecutor does not work up a case himself. The information he gets always comes from agents of the investigating agency.

It is unrealistic to think that an assistant U.S. attorney somewhere in the middle of Iowa or North Dakota goes on a grand jury expedition and digs up thousands and thousands of documents. That case is brought to him by that agency who has civil powers anyway.

The way that is done—simply, the agency attorney goes to the court and makes a demonstration that he knows facts 1, 2, 3, 4, exist; he knows that the grand jury is investigating the matter and, he needs it to supply facts 7, 8, 9. That is the way to get around that problem.

[The prepared statement follows:]

PREPARED STATEMENT OF PETER F. VAIRA

Mr. Chairman and members of the Committee:

My name is Peter F. Vaira. I am a member of the Section of Criminal Justice of the American Bar Association (ABA) and vice-chairperson of the Section's Grand Jury Committee. With me today is Alan C. Brown, who is a member of the Council of the Section of Public Contract Law.

We appear before you at the request of William W. Falsgraf, President of the ABA, to express the Association's views on the issue of access to grand jury materials as proposed in S. 1676, the Grand Jury Disclosure Amendments Act of 1985, and Section 5 of S. 1562, a bill to amend the False Claims Act.

By way of introduction, I was an attorney with the U.S. Department of Justice for 15 years. I served as the Attorney in Charge of both the Philadelphia and Chicago Strike Task Forces on Organized Crime. From 1978 through 1983 I was the United States Attorney for the Eastern District of Pennsylvania, which includes Philadelphia. I am currently a partner in the Chicago law firm of Lord, Bissell, and Brook. My practice is almost entirely in the white collar crime field. I am the author of numerous articles on the grand jury. The most recent is The Role of the Prosecutor Inside the Grand Jury Room, Northwestern Journal of Criminal Law and Criminology (Fall Issue 1985). I am also the author of Corporate Responses to Federal Grand Jury Investigations, published by Matthew Bender, Inc.

The ABA is concerned that S. 1676 and S. 1562 will cause the grand jury to depart from its traditional role of ferretting out crime, instead causing it to be used to gather information for the civil and administrative agencies of the United States.

In 1982, the American Bar Association filed an amicus curiae brief in U.S. v. Sells Engineering, Inc., 103 S. Ct. 3133 (1983), supporting the view that Justice Department attorneys need a court order for access to grand jury materials, and must show particularized need. As you know, this pending legislation would overturn the Supreme Court's decision in Sells, which strongly reaffirmed the Ninth Circuit's requirement of judicial authorization before grand jury materials may be disclosed to government attorneys for civil purposes.

The historic purpose of the grand jury is to protect citizens against unfounded accusations, either by private persons or by the government. Ex parte Bain, 121 U.S. 1 (1887). In order to ferret out crime and to find the truth of accusations, the grand jury has been given broad, sweeping powers of investigation. Branzburg v. Hays, 408 U.S. 665 (1972). No other institution in our legal system has as much power to subpoena and examine information. The courts have accorded the grand jury these powers because of the government's need to investigate crimes in a manner that will assure prompt and thorough scrutiny. Due process rights accorded in other civil or criminal proceedings are not afforded in grand jury investigations. The right to counsel, to know one's accusers, to cross examine, indeed, to see one's own testimony, do not apply.

The two bills under consideration, S. 1676 and 1562, would allow the government to use the grand jury's investigative powers to aid civil agencies in litigation against those targeted by a grand jury. This would be a misuse of the grand jury, not intended by the Framers of the Constitution.

With so many crimes today having attendant civil remedies -- such as multiple damages or debarment from doing business with the government -- the thrust of the investigation of those crimes could easily become civil.

These cases are very complicated, often too complicated to be fully dealt with by grand jury investigation. The tendency will be to subpoena all documents before the grand jury, use the grand jury to compel the immunized testimony of a key witness, and then turn the documents over to agents of a civil agency to work up a civil case. This could occur in any simple criminal case. Larger fraud cases could end up being brought as civil cases as well. This could easily be accomplished by demonstrating to a court that the information subpoenaed has disclosed monies due and owing to the United States. That simple showing will most likely satisfy the term "substantial need."

Because the grand jury is an institution for investigating crime, the current procedure allows release of grand jury material only upon a showing of particularized need, and only when it is necessary to prevent an injustice in a judicial proceeding. The need for the material must be particularized -- only so much disclosed as is necessary. The provisions in the proposed bills will wipe away these protections and allow wholesale disclosure to civil agencies.

The tendency will be to use the grand jury more frequently in order to effect wholesale disclosure. There is historical precedent for this practice -- witness the increased use of the grand jury for IRS tax cases.

These bills would discourage the civil and administrative agencies of the United States from conducting their own investigations and encourage them to take more matters to the prosecutor and use the grand jury at the outset.

The various agencies have their own investigative powers. The Inspectors-General may subpoena documents. The IRS has the power of summons. If these agencies need more manpower to investigate, the answer is to give them more manpower, not try to give them unlimited access to the grand jury.

The grand jury as an institution has been given broad powers by the courts in derogation of the normal legal rights accorded in other settings. If the courts realize that the grand jury is being used for civil process, there will be a tendency to relax the restrictions which the courts have felt were so necessary to protect the grand jury's power. Witnesses can be given a copy of their transcripts; grand jury material may be disclosed to targets at crucial times before indictment. The courts can easily grant disclosure of the prosecutor's remarks to the grand jury, his advice on the law, and the names of witnesses who appeared.

These two bills could be the start of the disintegration of the grand jury.

S. 1562's provision to permit disclosure to Congressional committees will completely sweep away the secrecy protection given innocent persons under investigation and those witnesses who testify.

The secrecy of grand jury testimony has been jealously guarded, and there are valid reasons for protecting it.

The prosecutor's grand jury subpoena power is extremely broad. There are no restrictions on who he may subpoena, and very little restrictions on what he may ask the witness. There are virtually no restrictions on the relevance of his questions. Indeed, the courts have said that the grand jury must be free to pursue all avenues of investigation, even if they are based on hearsay, rumors, or tips. Branzburg v. Hays, supra. Persons who are the targets of the questioning are present. No lawyers representing the witnesses are present. The rationale for all this is to allow the witnesses to speak freely. The downside of course is that the information disclosed may be incorrect, or completely uncorroborated hearsay. It is not until all evidence is compiled that the grand jury may determine if a crime has been committed, and who committed it. In the process, much incorrect information may be gathered. If the information were released, many innocent persons would be damaged in their reputation or businesses. The stock of publicly traded companies would be affected, thus injuring the holdings of innocent shareholders.

Even in the very narrow exceptions where grand jury testimony is permitted, by court order, to be released for use in a subsequent civil proceeding, the grand jury matter must be used to prevent an injustice in the proceeding, and the need must outweigh the continuing need for grand jury secrecy. The release cannot be indiscriminate; only that testimony can be released which is particularly needed for the proceeding.

S. 1562 would completely sweep away the secrecy protection of the grand jury. There are no "particularized need" protections. The disclosure will be made if the Congressional committee can show "substantial need." Because a legislative committee really has no relevancy restrictions, all the grand jury matter or a particular subject will be disclosed to the committee for the wide use and dissemination which is necessary in legislative hearings. The rumors, tips, hearsay, incorrect statements will become public. Innocent persons and companies will be unnecessarily harmed.

S. 1652 may also be a violation of the Doctrine of Separation of Powers. The grand jury is an institution for the prosection of crime, a function of the executive branch. It is regulated by the judicial branch. Crimes are prosecuted before and punished by the judicial branch. There can be found no reference in the history of the grand jury since its early beginnings in Anglo Saxon times of its use for legislative purposes. The use of grand jury material by the legislative branch threatens to subvert the purpose of the grand jury. Legislative proceedings are not to be secret and must be conducted by those who are elected to make laws. The questioning in legislative hearings is not to be accomplished by officers of the law. S. 1562 completely breaks down those functions drawn by the framers of the Constitution.

* * * *

Mr. Chairman, on behalf of the American Bar Association, I would like to thank you and the Committee for inviting us to present these views. I would be pleased to answer any questions you or members of the Committee may have.

Senator LAXALT. Let me ask you this, and the members of the panel can speak to this. We tend in a lot of these hearings to think only in governmental terms—what is right for Justice, what is right for the inspectors general, and so forth.

How does this affect the ordinary citizen out there?

Mr. VAIRA. Are you addressing that to me, sir?

Senator LAXALT. Yes, to any one of you.

Mr. RUSSELL. Well, I anticipated, when I made my comments, I would be addressing that.

Senator LAXALT. Were you going to speak to this, Mr. Russell?

Mr. RUSSELL. Yes, sir. For the last 17 years, I have been representing those ordinary citizens.

Senator LAXALT. All right. My timing was appropriate, then. Why do you not proceed?

Mr. RUSSELL. I am here on behalf of the National Association of Criminal——

Senator LAXALT. One moment here.

Mr. RUSSELL. OK.

Senator LAXALT. I did not mean to pass you over, Mr. Brown. I understand you did not have a statement, but you would be available for questions. Is that the case?

Mr. BROWN. That is correct, Senator.

Senator LAXALT. All right. Then we can proceed.

Mr. Russell.

Mr. RUSSELL. I am here on behalf of the National Association of Criminal Defense Lawyers—in excess of 4,000 lawyers. One of the purposes of the association is to promote justice and to preserve the judicial system, and we feel that the grand jury itself as an institution is an important element of the judicial system.

We are opposed to S. 1676 because, contrary to the impression left with this committee by the Department of Justice, this is a drastic and radical change from the past not only in this country, but historically throughout the centuries.

We are being asked by the Department of Justice in this bill to alter the grand jury system from being one of a criminal investigative arm of the Government, a secret group of individuals used by the U.S. attorney's office to ferret out crime—we are being asked, if this bill were to be passed, to expand that substantially into the areas of civil investigations, into the areas of administrative investigations, and go far beyond the traditional purposes of the grand jury.

It is our position that the grand jury is an instrument within the system that must be preserved, and preserved as is. I believe that, as my colleague has previously indicated, not only are we looking at substantial possible abuse and problems with the civil discovery, but I might add in regard to the civil area that the fear that I have is that civil law is completely different from criminal law.

In civil law, we have an adversary system that is open and in public. We have private lawyers on both sides that argue cases from both sides, that do their discovery from both sides. Everybody knows what is going on, and the people that are involved in the lawsuits are not necessarily concerned about their reputations.

That is substantially different from a criminal investigation before a grand jury, where what we are trying to do is ferret out crime, but we are trying to protect those individuals who are being looked at but may not have done anything wrong, and we are trying to keep it all secret.

Senator LAXALT. Are you saying then, that under this legislation a civil case could be developed with all the secrecy of a grand jury proceeding against someone who is not permitted to have counsel present or even to have access to the grand jury transcript?

I know you are not here representing them and you are representing the criminal lawyers, but what about the people who could have a civil case made against them through the grand jury process?

Mr. RUSSELL. Well, if they use the grand jury in the same way that they do in a criminal investigation, that individual who is having a civil case investigated is risking the fact that he does not really know what is going on. He does not have the same adversary proceedings that we have in a regular civil investigation, whether it be the IRS or the FDIC or the SEC.

That individual is represented by a lawyer in negotiating, in the taking of depositions, in the presentation of evidence and in discovery. Before a grand jury, he cannot be so represented.

I would like to emphasize, in response to your comment just now, that I am here not just as an individual that represents criminal defendants who are often targets. A good deal of my practice, which has been in Federal court for the last 17 years, is representing witnesses who testify in front of grand juries.

I think it is just as important not only to protect those targets of the investigation who may not be charged with crime, but to protect those witnesses who want to come forward and tell the whole story and tell the whole truth, and yet they do that with a great deal of risk.

What the result would be, if a bill such as this were to pass, is that they would be a lot more reluctant. There would be a substantial chilling effect on the grand jury in handling those witnesses.

Senator LAXALT. Why would that be the case?

Mr. RUSSELL. The ordinary person that comes to my office as a witness is extremely fearful of going before the grand jury in the first place. The ordinary person does not want to have to tell his story or have to give evidence that can be used and make himself a potential witness.

He is willing to do it because it is secret, because he is aware that there is only a very, very exclusive, limited number of individuals—a court and perhaps a couple of U.S. attorneys and the grand jury itself—that is aware of his testimony. With that knowledge, he is a lot more comfortable in telling his story.

Senator LAXALT. If I may, while I am thinking of it—I do not mean to interrupt, but is not, as a practical matter, information from a grand jury proceeding pretty much in the Justice Department public domain?

Mr. RUSSELL. No, sir.

Senator LAXALT. You do not think that is the case as a practical matter. Suppose I were a U.S. attorney out in Idaho and there was a proceeding out here in New York, a grand jury proceeding, and there might be some effect upon my particular jurisdiction in Idaho.

Could I not very easily contact Rudy in New York and say, Rudy, this may have an impact upon my situation in Idaho and I would like to be privy to some of your grand jury information?

Mr. VAIRA. That is true; that is correct.

Senator LAXALT. That is correct, is it not?

Mr. VAIRA. That is correct.

Mr. RUSSELL. You can make that general statement, but I am not so sure that you can take the transcript of the testimony of a particular witness and give it to any U.S. attorney in the country without going to a court and saying there is a particularized need which is provided under rule 6(e).

Senator LAXALT. If you were aware of that, you would move in a hurry, would you not, as a defense lawyer?

Mr. RUSSELL. Certainly, and not just as a defense lawyer, but if I were a U.S. attorney in that situation. I think the bottom line of our position is that there is sufficient possibility within current rule 6(e), in the situation you posit, to obtain that transcript and provide it to other U.S. attorneys or necessary investigative agencies.

All you would have to do is file a motion with a court, show a particularized need, get an order from the court, and then obtain the transcripts.

I see the red light is on, so I would be happy to answer questions.

Senator LAXALT. Do not worry about it; we will ignore it. Do you have anything further to offer?

Mr. RUSSELL. Well, I was going to conclude by stating that it appears to me that the Department of Justice standard that they are proposing is rather inappropriate. They are using a substantial need standard rather than a particularized need standard.

After reviewing Justice Department's section-by-section analysis which was printed in the Congressional Record on September 23, it is obvious to me that their substantial need would basically be an economic need; that is, it would be a little cheaper if we could just use the grand jury for the civil process and the agency processes.

If that test if what would be used, I think what we would be doing is giving the entire authority to the particular U.S. attorney to merely go forward and say, I need this because it is going to save some money. I think that would denigrate the grand jury system that this country has relied on and that the U.S. attorney is using so much in his ferreting out of crime.

[The prepared statement follows:]

PREPARED STATEMENT OF DAVID W. RUSSELL

Mr. Chairman and distinguished members of the Committee, my name is David W. Russell, and I am President of the National Association of Criminal Defense Lawyers. I am deeply appreciative of the opportunity to appear before you today to present testimony on behalf of the Association regarding S.1676 and S.1562 and the issues they raise concerning disclosure of grand jury materials.

The National Association of Criminal Defense Lawyers (NACDL) is a nationwide, voluntary bar association comprised of over 4,000 lawyers and law professors, most of whom are actively engaged in defending criminal prosecutions and individual rights. NACDL is specifically dedicated to promoting the proper administration of criminal justice.

NACDL was founded 26 years ago to promote study and research in the field of criminal defense law, and to encourage the integrity, independence and expertise of criminal defense lawyers. Throughout our history, we have worked to protect the rights and liberties of those accused of criminal offenses. We have pursued these goals through a variety of educational and public service activities, including national training programs, publications, committee activities, legislative action, and by appearing as amicus curiae in significant criminal justice cases.

Introduction

Mr. Chairman, NACDL fully appreciates the concerns and frustrations that led the Department of Justice to propose the legislation which is before the Committee today as S.1676. In the Sells case (United States v. Sells Engineering, Inc., 463 U.S. 418 (1983)), the Supreme Court came within one vote of granting automatic disclosure of grand jury materials to Justice Department attorneys involved solely in civil litigation. Had such an outcome occurred, the job of those attorneys would have been made vastly easier, at considerable savings of time and expense to the Justice Department.

It is our view, however, that the Sells case was quite properly decided, not just as a matter of the proper construction of Rule 6(e) and its legislative history, but more importantly, as a matter of the fundamental purposes and policies underlying the role of the grand jury and grand jury secrecy. It is further our view that these purposes and policies overwhelmingly outweigh the countervailing considerations of convenience and cost-savings to the Justice Department in bringing civil actions. We agree with the Court's policy analysis in Sells, and strongly urge that this Committee and the Congress refrain from taking any action to overturn the Court's decision.

This notion of automatic disclosure to civil attorneys, Mr. Chairman, cuts to the very heart of the adversarial process in civil cases. It would give an overwhelming, non-reciprocal investigative advantage to the Government, by effectively making available to Government attorneys in civil cases new authority to compel testimony, to do so in the absence of the defendant's attorney, and to override a defendant's Fifth Amendment rights. No doubt the defense would be happy to partake also of these advantages, particularly the ability to question Government agents and other witnesses without Government counsel being present. But unless these powers are extended to defendants as well -- and this does not, I sense, appear to be the present plan -- the proposed amendments threaten to turn civil actions into a one-sided romp. And as the Court stated in Sells: "In civil litigation as in criminal, `it is rarely justifiable for the [Government] to have exclusive access to a storehouse of relevant fact.'" 463 U.S. at 434, *quoting* *Dennis v. United States,* 384 U.S. 855, 873 (1966).

But the most astonishing aspect of the Justice Department's proposed legislation is its extraordinary potential for an immense chilling effect on the willingness of witnesses to come before the grand jury with evidence. The cloak of secrecy which presently encourages and emboldens individuals to bear witness against criminal endeavors would be relaced with the Government's assurance that the witness's "secrets" could be shared as a matter of course with several thousand Justice Department attorneys, and as a matter of pro forma court order, with a horde of law enforcement agents from other Federal agencies. Witnesses would naturally entertain serious reservations about testifying, faced with the awareness that their testimony could very easily come back to haunt them in a variety of other civil and administrative forums.

Indeed, it is difficult to believe that the Department of Justice has fully thought out the potential deleterious effects of this legislation on their ability to ferret out crime. I would suggest that the responsibility to give full consideration to this issue falls heavily -- by default -- on this Committee.

We likewise support the Court's 8-1 decision in the companion case of *United States v. Baggott,* 463 U.S. 476 (1983), and agree that where administrative proceedings do not require resort to litigation, disclosure of grand jury materials for purposes of such administrative purposes would be unwarranted and inappropriate.

Finally, we must strongly oppose the provisions of S.1562 which would permit disclosure of grand jury materials to Congressional committees and their staffs. Of the proposals before the Committee today, none presents a greater risk of disclosure to the public at large and to the media, nor, consequently, a greater threat to the fundamental tradition of grand jury secrecy.

The *Sells* case

I would like initially to touch upon the high points of the *Sells* Court's policy analysis. I refer to the portion of the decision which is concerned more with the kind of policy issues which confront this Committee today, than with mere questions of statutory construction and the legislative intent of some bygone Congress -- questions which are not, of course, of great persuasive effect in the present context.

The *Sells* Court's conclusion rejecting automatic disclosure to Justice Department civil attorneys was mandated primarily, as the Court said, "by the general purposes and policies of grand jury secrecy." 463 U.S. at 418. Against "the strong historic policy of preserving grand jury secrecy," 463 U.S. at 417, it weighed the interests advanced by the Government, and concluded that:

> Of course, it would be of substantial help to a Justice Department civil attorney if he had free access to a storehouse of evidence compiled by a grand jury; but that is of a different order from the prosecutor's need for access. *The civil lawyer's need is ordinarily nothing more than a matter of saving time and expense.* The same argument could be made for access on behalf of any lawyer in another Government agency, or indeed, in private practice. We have consistently rejected the argument that such savings

> can justify a breach of grand jury secrecy. 463 U.S. at 431 (emphasis added).

The question confronting the Court -- and hence, by derivation, the question confronting this Committee -- cannot be characterized as a drastic choice between allowing or denying access to relevant information by Government civil attorneys; the question is simply what form that access should take and how convenient it should be. As the Court stated:

> In most cases, the same evidence that could be obtained from the grand jury will be available through ordinary discovery or other routine avenues of investigation. If, in a particular case, ordinary discovery is insufficient for some reason, the Government may request disclosure under a [Rule 6(e)(3)(C)(i)] court order. Id.

The proponents of disclosure to Government civil attorneys seem to be focusing primarily on the benefits in the civil arena. But they seem ironically to be giving little attention to the potential for harm to the Government's present arsenal of weapons in the criminal arena. And yet there seem to be several respects in which the grand jury's effectiveness in ferreting out crime may in fact be impaired by the proposed amendments. These considerations, which the Court characterized as threatening to do "affirmative mischief" to the grand jury process, bear closer scrutiny by both the Department of Justice and this Committee. The possibility cannot be lightly dismissed -- that five Justices of the U.S. Supreme Court just might be right, and the Justice Department might be trading away the long-term effectiveness of the grand jury for a little immediate assistance with their civil caseload. The question for this Committee is: Is it worth the risk?

The first consideration of "affirmative mischief" identified by the Court should be the most compelling for the Justice Department: the chilling effect on potential grand jury witnesses. As the Court stated:

> Not only does disclosure increase the number of persons to whom the information is available (thereby increasing the risk of inadvertent or illegal release to others), but also it renders considerably more concrete the threat to the willingness of witnesses to come forward and testify fully and candidly. If a witness knows or fears that his testimony before the grand jury will be routinely available for use in governmental civil litigation or administrative action, he may well be less willing to speak for fear that he will get himself into trouble in some other forum. 463 U.S. at 432.

The second consideration identified by the Court is the risk that prosecutors "might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit, or even to start or continue a grand jury inquiry where no criminal prosecution seemed likely." Id. Such a result, the Court stated, would be "improper per se." Id.

In this regard, we are aware that the Justice Department expresses great frustration at the apparently artificial barrier which current law erects between their civil and criminal divisions. Why shouldn't information on some attorney's desk on the third floor be available to the kindred attorney laboring away a scant two floors below with the same mission of upholding the laws of the Nation?

We would suggest that it is this very same proximity and kindredness of spirit which inspires our and the Court's concern. If automatic disclosure were guaranteed for civil attorneys, even the most well-intentioned and honorable of Criminal Division attorneys would be hard pressed to avoid leading an investigation -- if only subconsciously -- into a somewhat broader inquiry than he would otherwise have pursued, secure in the knowledge that excess information not suitable for his criminal matter might nonetheless be helpful to his good friend or regular squash partner upstairs.

The third "affirmative mischief" consideration enumerated by the Court should be of particular concern in this legislative forum. The Court expressed apprehension that making the "relatively unregulated power" of the grand jury available in a civil or administrative context would "threaten to subvert the limitations applied outside the grand jury context on the Government's powers of discovery and investigation." 463 U.S. at 433. "Other agencies," the Court noted, "operate under specific and detailed statutes, rules, or regulations conferring only limited authority to require citizens to testify or produce evidence." Id. Examples of such formal limitations which would be threatened with obsolescence include the numerous provisions for civil summons upon which agencies such as the Internal Revenue Service, the Customs Service, and the Environmental Protection Agency, have heretofore based their investigative activities.

The legislative proposals under consideration today, then, would operate to override or repeal indirectly such other restrictions as Congress has over the years seen fit to impose, in a variety of statutes and rules, on the Government's ability to conduct civil discovery and investigation. It was precisely this possibility that led the House Judiciary Committee to reject certain language to amend Rule 6(e) in 1977, while stating that:

> It was feared that the proposed change would allow Government agency personnel to obtain grand jury information which they could later use in connection with an unrelated civil or criminal case. This would enable those agencies to circumvent the investigative procedure otherwise available to them. H. Rep. no. 95-195, at 4 (1977).

We strongly urge this Committee to take no action on this legislation until it has completed a thorough analysis of the full scope of the "ripple effect" on these other legislative provisions currently governing civil discovery. No doubt the Committee will wish to be particularly sensitive to the fact that many such provisions fall within the jurisdiction of Senate Committees other than Judiciary.

One final point discussed by the Sells Court is of particular note for purposes of today's hearing. In its discussion of the legislative history of the relevant portions of Rule 6(e), the Court made reference to the testimony of then Acting Deputy Attorney General Richard Thornburgh, testifying on behalf of the Justice Department at House hearings in 1977. At that time, Mr. Thornburgh, who was an appointee of a Republican Administration and is currently the Republican Governor of Pennsylvania, acknowledged that it would be a bad idea to allow agency personnel to use grand jury materials for civil purposes. See 463 U.S. at 439. In view of this relatively recent statement, it would not be difficult to conclude that the precipitating factor behind the Justice Department's contrary position today is simply the encouragement that they have derived from the closeness of the Supreme Court's vote in Sells, rather than the inherent wisdom of their position.

The proposed "substantial need" standard

Where the third party seeking disclosure of grand jury materials pursuant to a court order under paragraph (C)(i) of Rule 6(e)(3) is an employee of any Federal agency, S.1676 would permit such disclosure to be made upon a showing of "substantial need" rather than the current standard of "particularized need." In the section-by-section analysis submitted together with the proposed legislation, the Justice Department explains that the change of terms is specifically designed to require that the court take into consideration the convenience to the Justice Department if disclosure is allowed -- including "the government's saving time or increasing efficiency," the cost burden, and the avoidance of unnecessary inefficiency or waste of resources. Finally, the analysis proposes that "a court would not be able to deny disclosure merely because the agency for whom disclosure is sought may have alternative discovery tools available to it."

The Justice Department's analysis suggests that the operative difference between the two standards is merely one of degree. We would suggest that this is not correct. There is a very significant difference in kind: nowhere in the Justice Department's materials is there any reference to the notion of particularity -- the notion that disclosure is appropriate only with respect to that portion of the grand jury materials which bears some identifiable relation to a legitimate civil or administrative matter pending before the requesting agency. As the Supreme Court stated in creating the requirement of particularized need under Rule 6(e), "We hold that a much more particularized, more discrete showing of need is necessary to establish 'good cause.'" United States v. Procter and Gambel Co., 356 U.S. 677, 683 (1958). Indeed, under the proposed legislation, the requesting agency would be in a position to argue that the court is precluded from imposing any standard of particularity at all, and therefore from granting disclosure with respect to anything less than the entire grand jury record.

The historical criminal priority of the grand jury

Two key points touched upon in Sells bear further discussion. The first is the exclusive criminal orientation of the grand jury -- an orientation which dates back virtually to the dawn of Western civilization.

The grand jury as we know it today originated in England in 1166 A.D., at the time of the Assize of Clarendon. Its sole purpose was to discover and present to the king's officials persons suspected of serious crime. See 1 Holdsworth, A History of English Law, 321 (7th ed. 1956). Legal scholars have determined that similar accusing bodies may have been utilized by the Athenians before the Christian era, by the Saxons who settled in England in the fifth and seventh centuries, and by the Scandanavians in the eighth century. See Calkins, Grand Jury Secrecy, 63 Mich. L. Rev., 455, 456 n.4 (1965).

Current Rule 6(e) maintains as the sole purpose of grand juries the ferreting out of criminal activity. At the same time, it also permits certain other disclosures, including those in a civil context, where a court issues an appropriate order upon a showing of good cause. The purpose to which the material so disclosed is put is entirely incidental to, and derivative from, the criminal focus of the grand jury's work. It does not influence the grand jury's actions, but derives from them.

In this context, the federal grand jury in this country has been permitted to accumulate the extraordinary powers which it now possesses, including to power to compel testimony and suspend various constitutional rights. All this is reasonable enough, the Supreme Court has said, in pursuit of the goal of encouraging free disclosure by persons who have information regarding the commission of crimes, as long as the secrecy of the grand jury can be maintained. United States v. Procter and Gambel, supra at 681 n.6. Even the Justice Department's own section-by-section analysis of S.1676 pays lip service to this principle, when it states that the proposed legislation "recognizes that the primary purpose of a grand jury is, and must remain, to enforce federal criminal laws."

(The Department rather disingenuously suggests that "the best way to make the criminal priority explicit" is for the Department to issue guidelines of its own stating that each criminal prosecutor shall have full discretion to decide whether, when and what materials to disclose to the Department's civil attorneys, for the purpose of ensuring that the grand jury will not be "improperly used to gather evidence for civil purposes." We are at a loss to understand why "the best way" would not be for Congress itself to make this explicit -- and to do so in considerably more detail than the Department offers in its vague and ephemeral treatment of the issue in the section-by-section analysis.)

The proposed amendment to Rule 6(e) would shatter this equilibrium between criminal investigation and grand jury secrecy which has come into being over the centuries. The virtually unrestricted sharing of grand jury materials with civil attorneys would inevitably begin to transform the Civil Division into a silent partner in the grand jury investigative process. The presence of the civil attorneys, waiting patiently in the wings for the grand jury's leavings, would inevitably make itself felt to their prosecutorial brethren. And with disclosure elevated to an automatic level, the incorporation of civil inquiries directly into the grand jury process would in time become increasingly open and purposeful. This problem would be compounded by the prospect of vastly facilitated access to grand jury materials, by way of court order, by virtually any Federal employee having law enforcement duties. Defendants in the resulting civil cases wouldn't stand a chance.

The grand jury and the court

The other point in Sells that bears emphasis involves the relationship between the grand jury and the court. It has frequently been said that the grand jury is an arm of the court by which it is appointed. As the Supreme Court stated in Brown v. United States, 359 U.S. 41 (1959): "A grand jury is clothed with great independence in many areas, but it remains an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses." As a result, the court retains considerable supervisory authority over the grand jury operations. See LaFave and Israel, Criminal Procedure, 360-61 (1985).

The exercise of this supervisory authority, insofar as the disclosure of grand jury materials to third parties is concerned, is currently provided for in paragraph (C)(i) of Rule 6(e)(3). A court order may be issued permitting disclosure upon a showing of particularized need. United States v. Procter and Gamble, supra at 681. The Sells Court, as noted earlier, suggested that the availability of such court orders should be sufficient to obtain discovery of any necessary materials which for some reason may not be available through ordinary discovery. And Acting Deputy Attorney General Thornburgh, at the 1977 House hearings, offered his express approval of this approach as the official practice of the Justice Department, when he stated: "It would be the practice of the Department at that time [when a grand jury's criminal fraud investigation has ended without an indictment] to seek a 6(e) order from the court in order that the evidence could be made available for whatever civil contempt consequences might ensue." Hearings, House Committee on the Judiciary, 95th Cong., 1st Sess., 67 (1977).

It is our position that the interposition of some form of judicial supervision or review is indispensible. It constitutes the only meaningful check on disclosures to third parties. Its indispensibility is particularly evident where the proposed alternative is, as in S.1676, to surrender full discretion over disclosure to the Government's own attorneys, to share with other Government attorneys. Such a plan would place the fox firmly in control of the hen-house.

S.1562

As I stated at the outset, the language in S.1562 providing for disclosure to committees of Congress presents the greatest risk of public disclosure, and consequently the greatest threat to what the Supreme Court has referred to as "the indispensable secrecy of grand jury proceedings -- as important for the protection of the innocent as for the pursuit of the guilty." United States v. Johnson, 319 U.S. 503, 513 (1943). As both the Administration and this Committee must be painfully aware, the risk of leaks on Capitol Hill is substantial.

It should be emphasized that the requisite security is not simply a matter of having a staff with integrity and good intentions: it is necessary to have a more tangible and enduring system of controls. The Senate Intelligence Committee, for example, in addition to its complex system of procedural protections regarding access and authorization, is equipped with a vault for classified documents, 24-hour security personnel and special locks for the main entrance, and no street-facing windows. Even so, as we know, leaks occur.

Most congressional committees which would be likely to seek disclosure of grand jury materials under the provisions of S.1562 are presently equipped with far less sophisticated security controls than the Intelligence Committees. Nor are those controls likely to spring up simply because S.1562 passes, particularly in light of the considerable expense involved and the fact that the bulk of the materials handled by such committees will continue to be of a non-sensitive nature.

It is our view that the Congress is able to exercise fully its appropriate oversight function without meddling in current investigations. In fact, we would suggest that congressional oversight of grand jury matters can best be accomplished when the committee is working from a completed record of the grand jury proceedings, rather than from fragments. To intervene in the middle of the process seems to do little more than excite public passion and arouse media interest.

Conclusion

To reiterate, we would strongly urge the Committee to take no action on the measures under consideration today. In the event, however, that the Committee determines to move forward on any aspect of this legislation, we would offer the following suggestions.

Do not abandon the "particularized need" standard in favor of a "substantial need" test. It is the main bulwark against unnecessary and unjustifiable disclosure of entire grand jury transcripts. If, for example, a 1,000-page grand jury record contains one page of material demonstrably necessary and relevant to an administrative tax matter, the particularized need standard would permit disclosure of only that one page, whereas under the substantial need test, all 1,000 pages could be turned over. Only a clearly articulated requirement of particularity can adequately safeguard against wide-ranging "fishing expeditions."

It would be far less problematic to legislate a somewhat reduced standard of particularized need in connection with disclosure to a governmental entity. Indeed, the *Sells* Court suggested that this might be appropriate, when it stated that "a district court might reasonably consider that disclosure to Justice Department attorneys poses less risk of further leakage or improper use than would disclosure to private parties or the general public." 463 U.S. at 445. The Court has also suggested that the required showing of particularized need may be reduced upon termination of the grand jury investigation. *Douglas Oil Co., v. Petroleum Stops Northwest*, 441 U.S. 211, 222 (1979). Finally, the Court has indicated that courts may weigh the general "public interest" served by disclosure to a Government body, together with the requisite particularized need, in determining whether the need for disclosure is greater than the need for continued secrecy. *Illinois v. Abbott Accociates*, 460 U.S. 557 (1983). We would emphasize, however, that if courts were to be permitted to reduce the Government's burden of showing particularized need through consideration of factors such as these, care should be taken to ensure that considerations of mere governmental convenience are not persuasive, and that consideration continue to be given to the availability of alternate discovery tools.

Do not permit the dilution or diversion of the grand jury's criminal priority. Rather than giving complete discretion to the Justice Department to determine why, when and what should be shared between their Criminal and Civil Divisions, tightly crafted standards should be included in the legislation itself, to be subject to judicial supervision. Instead of providing for automatic disclosure to Justice Department civil attorneys, such attorneys should be made subject to the same particularized need standard (whether or not incorporating the "Government discounts" I have just discussed) as all governmental law enforcement personnel other than the prosecuting attorneys in the criminal investigation. All such third-party disclosure matters would thus be subject to objective, arms-length judicial supervision and review, to safeguard the integrity and effectiveness of the grand jury from possible corruption by civil or administrative priorities.

As far as Baggott issues are concerned -- that is, disclosure to other agency personnel -- we would again urge no retreat from the essential safeguard of judicial involvement. If such disclosure is to be facilitated, let it be subject to review by the entity charged with supervision of the grand jury and from whom the grand jury draws its power. Only the court is in a position to consider and protect adequately the integrity of the grand jury process and the rights of the individuals involved. It is worth noting that in some jurisdictions which have declined to utilize the Rule 6(e) notion that third-party disclosures should be limited to matters involving "judicial proceedings," third-party disclosures may be authorized under a general exception for disclosure "upon written order of the court." Lafave and Israel, supra, at 366.

Mr. Chairman, that concludes my prepared statement. I thank you for the opportunity to present NACDL's views here today, and I would be pleased to answer any questions you or other members of the Committee may have.

Senator LAXALT. Is there case law that distinguishes between the standards of substantial need and particularized need?

Mr. RUSSELL. Well, there is case law on particularized need. I think that is what they are talking about in the *Sells* case and the *Baggot* case.

Senator LAXALT. How about substantial need? Is that a new term in this context?

Mr. RUSSELL. To me, that is a created term by the Department of Justice in this particular instance. As they have defined it in the Congressional Record on September 23, the focus is on economic need.

Senator LAXALT. And in your estimation we end up, bottom line, with a lower standard?

Mr. RUSSELL. Definitely, much lower. They do not have to explain why; they just say it is cheaper this way.

Senator LAXALT. Yes, yes.

Tell me, members of the panel, including Mr. Brown, do you see any way to salvage this piece of legislation or is it, in your estimation, dead in the water? Can it be cleaned up or modified so that it would meet the needs of the Civil Division as well as protect the rights of the people that you represent?

Mr. RUSSELL. I would like to encourage the committee to, first of all, meet with the Department of Justice and perhaps defense lawyers to try to determine a regulatory method to use the particularized need standards that presently exist under rule 6(e).

I think if we came up with proper regulation, we could handle a lot of these problems without having to go to the radical extremes recommended in this particular bill. So there are some potentials without having to go this far.

Senator LAXALT. Within the existing mechanism?

Mr. RUSSELL. Yes, sir.

Mr. BROWN. Senator, if I could address that point briefly——

Senator LAXALT. Yes, surely.

Mr. BROWN. I think there is a question today of whether there is any need today for this type of legislation to broaden access to grand jury materials. I spent several years in the Civil Division at Justice handling fraud cases in the fraud section.

There was a fairly short period of time following a decision by a fifth circuit that Civil Division attorneys could have free and unrestrained access to grand jury materials where that material was shared, and I think it was viewed as a convenience rather than a necessity at that point. That decision was overruled by the Supreme Court in the *Sells* decision.

Moreover, I think that today there is no need for that at all. At the time the *Sells* decision was begun and at the time of the *LTV* decision in the fifth circuit, we did not have an inspector general in the different agencies. Today, we have inspectors general in all of the agencies that have subpoena authority.

This morning, the Committee on Government Affairs voted out legislation which would grant the inspectors general testimonial subpoena authority. The recent DOD authorization act provided the Defense Contract Audit Agency with subpoena authority.

There just is no need today for the Civil Division or the administrative agencies to build their cases through use of grand jury materials. The Congress has given these agencies their own investigative powers through which they can develop their own cases.

Senator LAXALT. Tell me this, Mr. Russell. How would an outside agency or Civil Division attorney argue for information with any degree of particularity when the information is in the sole possession and control of criminal prosecutors?

How would a civil attorney, under your theory, be able to make that kind of presentation?

Mr. RUSSELL. A civil attorney or an outside agency?

Senator LAXALT. An outside agency.

Mr. RUSSELL. An outside agency—it would be extremely difficult, I concede, under the *Baggot* case. I think that is what the case is basically saying.

A civil attorney would have a lot easier access. As mentioned by Peter, they are all aware that there is an investigation going on; they are just not aware of the details. Probably one of the primary things pointed out by the Department of Justice is, for instance, a witness is not available; for example, because he is deceased.

They know he testified; they do not know what he testified to. They can go to a court with a particularized need and say, we really have to have this testimony; it is a crucial part of the investigation and he is deceased now.

The primary place I am involved is with the IRS, for instance. If the IRS comes to my client after the investigation and wants all of his original records and we have already provided those records to the grand jury during the course of the criminal investigation and we cannot give them to them, we explain that to the IRS.

Well, they then go to the judge for an order under a particularized need request, stating that they need those documents to conclude their civil investigation. I do not object to that. They have a right to do that.

There is a particularized need shown, the judge gives them the order, and they get the documents. Everybody knows that the investigation is going on; they just do not know the details. They are smart enough to figure out where it needs to fit into their investigation.

Senator LAXALT. We thank all of you. We will prepare a transcript and submit it to our colleagues, and I suspect that out of that process and through our own staff process, there may well be additional written questions and we would appreciate it if you would answer them.

Thank you very much; you have been most helpful.

Mr. VAIRA. Senator, may I make one final remark?

Senator LAXALT. Surely.

Mr. VAIRA. The American Bar Association would like to submit to your staff its amicus curiae brief in the *Sells* case. It has a lot of history and a lot of good law in it, and it gives you some idea of some circumstances that I did not speak about this morning.

Senator LAXALT. That would be very helpful. Do you want to make it part of the record?

Mr. VAIRA. I would like to do so.

Senator LAXALT. All right, without objection; I do not hear any.

Mr. VAIRA. Thank you.

[The following was received for the record:]

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

No. 81-1032

UNITED STATES OF AMERICA,
Petitioner
v.
SELLS ENGINEERING, INC., *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

The American Bar Association (hereinafter A.B.A.) is a voluntary, national membership organization of the legal profession. Its more than 280,000 members come from every state, territory, and the District of Columbia. Its constituency includes prosecutors; public defenders; private lawyers; trial and appellate judges at the state and federal levels; legislators; law professors; law enforcement and corrections personnel; law students; and a number of nonlawyer "associates" in allied fields. Since its inception over 100 years ago, the Association has taken an active interest in the improvement of the administration of justice.

As part of that effort, the A.B.A. has been concerned with the role of the Grand Jury as indicated by the adoption by the A.B.A. House of Delegates of 30 A.B.A. Grand Jury Principles and an A.B.A. Model Grand Jury Act. *See A.B.A. Grand Jury Policy and Model Act (1977-1982)*[1] (1982). The Association's concern in adopting these policies was twofold: to preserve the grand jury's important function in investigating possible criminal activity and, at the same time, to guarantee procedural fairness. The premise underlying the Association's recommendations was a belief that these objectives could be best accomplished by maintaining the historic secrecy of the grand jury and by limiting access to grand jury materials, absent a court order, to those who appear before the grand jury as part of their duty to enforce federal criminal law. The concern for potential abuse was not diminished by recognition of the fact that most prosecutors exercise their powers in a responsible fashion. Rather, the need for procedural guarantees was felt warranted because the "growing number" of alleged cases of grand jury abuse suggested "that judicial attempt[s] to monitor the prosecutor's conduct on a case-by-case basis cannot remedy the institutional defects which permit the abuses to occur . . ." *Grand Jury Policy and Model Act* at 20.

The Association's interest, however, goes beyond a general concern for grand jury procedures and specifically focuses upon the interpretation of Federal Rule of Criminal Procedure 6(e) which is the subject of the litigation in the case at bar. The Association supported the 1977 amendment to Rule 6(e) which facilitated the use of technical assistance for government lawyers in grand jury investigations. At the same time, the Association's spokesman made it clear that the dissemination of grand jury information to government personnel must not be

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[1] This document was published by the Criminal Justice Section of the American Bar Association in June of 1982. In subsequent references it will be referred to as "*Grand Jury Policy and Model Act.*"

"used in violation of any constitutional rights, in unrelated criminal cases, or in any civil proceedings." *Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings before the Subcommittee on Criminal Justice of the House Committee on the Judiciary,* 95th Cong., 1st Sess. 111 (1977).[2] Furthermore, the Association urged Congress to adopt an explicit legislative statement to guard against misinterpretation of the rule which could lead to misuse of grand jury materials for civil purposes. *Id.* Subsequently the Association proposed an amendment to present Rule 6(e)(3)(A)(i) which would make its understanding of that rule explicit by limiting disclosure without a court order to a government attorney "for use in the performance of such attorney's duty *to enforce federal criminal law*" (addition underlined). *Grand Jury Policy and Model Act* at 5.[3]

Since membership of the A.B.A. includes prosecutors, defense attorneys, and judges who must act within the guidelines of any ruling by this Court as to the proper interpretation of that criminal rule, the A.B.A.'s interest is significant. The Association, in recognition of the importance of the traditional secrecy of the Grand Jury and of the intent of the limited scope of the 1977 amendment to Criminal Rule 6(e), participates as Amicus Curiae[4] to urge this Court to affirm the decision of the United States Court of Appeals for the Ninth Circuit requiring judicial authorization before grand jury materials may be disclosed to government attorneys for civil purposes.

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[2] In subsequent references this publication will be identified as "Hearings."

[3] The Association's proposed amendment to Rule 6(e)(3)(A)(i) has been submitted to the Judicial Conference's Advisory Committee on Criminal Rules. The Committee has tabled consideration of the proposal pending the Court's decision in the present case.

[4] Copies of letters indicating the parties' consent to the Association's participation have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

The American Bar Association appears as Amicus Curiae to address the question of whether Federal Rule of Criminal Procedure 6(e) authorizes an "attorney for the government" who has purely civil responsibilities to use grand jury material without court approval.[5] The Association believes that Criminal Rule 6(e) does not authorize such disclosure and urges this holding of the Ninth Circuit below be affirmed upon two separate grounds.

First, the Association would emphasize that the grand jury and the concomitant secrecy of its proceedings are older than the nation itself. Given the historic, constitutional, and policy grounds supporting the maintenance of confidentiality in such proceedings, any authorization for additional disclosure of grand jury information must be accompanied by an expression of intent in the clearest and most unequivocal form. Since there was no such expression of intent with respect to government attorneys with purely civil duties, the criminal rule cannot be properly interpreted to authorize such disclosure.

Second, an examination of the legislative history of the 1977 amendment to Criminal Rule 6(e) and the harm it was designed to overcome will demonstrate that its objective was limited to providing technical assistance to government attorneys who had responsibility for representing the government in proceedings before federal grand juries. This interpretation of Rule 6(e) does not mean that grand jury materials cannot be disclosed to government attorneys for civil law purposes. It only contemplates the continuation of the common law policy under which judicial authorization is required before such disclosure can be made.

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[5] This issue is presented by the United States' First Question for Review: "Whether an attorney serving in the Civil Division of the United States Department of Justice engaged in preparing a civil fraud action under the False Claims Act is 'an attorney for the government * * * performing such attorney's duty' within the meaning of Federal Rule of Criminal Procedure 6(e)(3)(A)(i), and accordingly is entitled to examine relevant grand jury materials without judicial authorization." Brief for the United States at (I).

Whether the individual seeking disclosure of grand jury materials represents a private litigant or is a government attorney with civil enforcement responsibilities, the standard which should guide the court should protect the policy interests underlying the secrecy of the grand jury and continue the common law practice of meaningful judicial supervision of disclosure in order to prevent the potential of grand jury abuse. Because the determination of whether such a standard was met here turns upon the particular facts of the case, this issue can be most effectively discussed by the parties and will not be addressed by the Association.

ARGUMENT

I. THE INTENT TO CREATE AN EXCEPTION TO GRAND JURY SECRECY MUST BE EXPRESSED IN CLEAR AND UNEQUIVOCAL TERMS

The grand jury is an institution whose roots extend into English common law. It was highly valued by the founders of this country and given constitutional stature by the ratification of the Fifth Amendment in 1791. One of the distinguishing characteristics of the grand jury is that, at least since the 1600s, its proceedings have been closed to the public and kept confidential. Calkins, "Grand Jury Secrecy," 63 Michigan L. Rev. 455, 457 (1965).

The idea of grand jury secrecy was "imported into our federal common law and is an integral part of our criminal justice system." *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218, n. 9 (1979) (citations omitted). This principle has been consistently reaffirmed by this Court. E.g., *Douglas Oil Co. v. Petrol Stops Northwest, supra* at 218; *Dennis v. United States*, 384

U.S. 855, 869 (1966); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958). *See also Smith v. United States*, 423 U.S. 1303, 1304 (1975) (Douglas, Circuit Justice). Criminal Rule 6(e), which sets forth a general rule of grand jury secrecy, is declaratory of these principles, *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 398 (1959), and of a policy that is "older than our Nation itself." *Id.* at 399. Except as specifically authorized, the rule prohibits disclosure of "matters occurring before a grand jury" by anyone, other than a witness, who has the right to be present in a grand jury proceeding. Fed. R. Crim. P. 6(e)(2). A knowing violation of this rule is punishable as a contempt of court.

In addition to the claims of history and the Constitution,[6] there are substantial policy reasons supporting protection for the confidentiality of grand jury proceedings. *See United States v. Rose*, 215 F. 2d 617, 628-29 (3d Cir. 1954), *quoted with approval* in *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219, n. 10 (1979), and *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681-682, n. 6 (1958). The Seventh Circuit in *In re State of Illinois Petition to Inspect and Copy Grand Jury Materials*, 659 F. 2d 800, 803, n. 7 (7th Cir. 1981) (pending on certiorari *sub nom. Illinois v. Abbott & Associates*,

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[6] It is worthy of note that the concept of grand jury secrecy may also have a constitutional dimension. The Fifth Amendment requires the federal government to use the grand jury to initiate the prosecution of felonies. This Court has indicated that secrecy is an "indispensable" aspect of the grand jury, *United States v. Johnson*, 319 U.S. 503, 513 (1943), and that its "proper functioning" "depends" upon the secrecy of the proceedings. *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979). An abrogation of grand jury secrecy that would alter its fundamental nature as defined at the time of the ratification of the Fifth Amendment or which would impair that institution to the extent that it could no longer function could constitute an abridgement of the Fifth Amendment itself.

No. 81-1114) identified reasons supporting grand jury secrecy even after the criminal proceedings have terminated to include:

> " '. . . to encourage free and untrammeled disclosure by persons who have information with respect to the commission of crimes; [and] to protect [the] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.' *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219 n. 10, 99 S.Ct. 1667, 1673 n. 10, 60 L.Ed.2d 156 (1979) (citation omitted). Moreover, 'the grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow.' *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682, 78 S.Ct. 983, 986, 2 L.Ed.2d 1077 (1958)."

Given the importance of the long-established rule of grand jury confidentiality, exceptions to grand jury secrecy should be attributed to the Criminal Rules only where there has been a clear and unequivocal expression of intent to abrogate such secrecy. This approach invokes a traditional principle of construction that actions in derogation of the common law must be strictly construed.

For example, judicial immunity, like grand jury secrecy, pre-dated the Constitution. When Congress enacted what is now codified as 42 U.S.C. § 1983, it provided for liability for "[e]very person" who acted under the color of state law to deprive another of his/her federal rights, privileges or immunities. Looking to the "face" of the statute, or applying a "plain meaning" rule, one might conclude that the "every person" language of § 1983 encompassed judges and that consequently they would be amenable to suit under that statute. Indeed, there was respectable authority for exactly that proposition. *Picking v. Pennsylvania R. Co.*, 151 F.2d 240, 250-

251 (3rd Cir. 1945). Nevertheless, this Court held that the doctrine of judicial immunity was so well established that unless Congress "specifically" provided for its abolition, such immunity was not deemed to have been affected by the "every person" language of the statute. *Pierson v. Ray*, 386 U.S. 547, 554 (1967).[7]

In the case at bar, the principle of grand jury secrecy is as firmly established and deeply rooted in history and law as official immunity. The interpretation which the United States seeks to place upon Criminal Rule 6(e) would result in an abrogation of a portion of that traditionally protected confidentiality.[8] Yet the relevant portion of the current rule provides no clear statement of an intention to further curtail grand jury secrecy. Rather, "the restrictions as presently enacted . . . leave *unresolved* the question of whether an 'attorney for the government' who has purely civil responsibilities may use grand jury material without court approval." *Grand Jury Policy and Model Act* at 15, Commentary to Proposed Amendment to Rule 6(e) F.R.Cr.P. (Emphasis added) Indeed, the fact that the lower federal courts are divided upon the extent to which Criminal Rule 6(e) authorizes disclosure, *compare, e.g., In re Grand Jury Investigation No. 78-184 (Sells v. United States)*, 642 F.2d 1184 (9th Cir. 1981) *with In re Grand Jury (LTV)*, 583 F.2d 128 (5th Cir. 1978), is itself an indication that there was no unequivocal expression of an intent to curtail grand jury confidentiality. This being the case, it must be presumed that the traditional secrecy of the grand jury continues.

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[7] This same reasoning had previously been utilized in *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) where the Court held that the "general language" of § 1983 was not sufficient to overcome the well-established principle of legislative immunity.

[8] The concern for the confidentiality of grand jury materials reaches beyond disclosure to government attorneys with civil enforcement responsibilities and extends to the use of grand jury materials in civil litigation. If such information were to be kept confidential and shielded from discovery, then the government would enjoy an unfair advantage over an opposing party in civil litigation. On the other hand, disclosure of grand jury materials to an opposing civil litigant would further erode grand jury secrecy. Utilization of the court-ordered disclosure provisions of Criminal Rule 6(e)(3)(C) avoids this dilemma by allowing the court to weigh the need for disclosure against the requirements of secrecy in grand jury proceedings.

II. RULE 6(e) REQUIRES JUDICIAL AUTHORIZATION BEFORE GRAND JURY MATERIALS MAY BE DISCLOSED TO JUSTICE DEPARTMENT CIVIL DIVISION ATTORNEYS FOR USE IN CIVIL LITIGATION

Rule 6(e) of the Federal Rules of Criminal Procedure recognizes two types of exceptions to the general rule of secrecy: court-ordered disclosure, Fed. R. Crim. P. 6(e)(3)(C), and automatic disclosure without the need for judicial authorization, Fed. R. Crim. P. 6(e)(3)(A). The automatic disclosure provisions of Rule 6(e) are limited to attorneys for the government for use in the performance of their duties, Fed. R. Crim. P. 6(e)(3)(A)(i), and to government personnel to assist an attorney for the government in the performance of his/her duties to enforce federal criminal law. Fed. R. Crim. P. 6(e)(3)(A)(ii). Except for these two limited situations allowing free access to grand jury materials, Rule 6(e) requires application to a court for lawful disclosure of such material.

The only cases in which this Court has examined disclosure of materials covered by grand jury secrecy have concerned court-ordered disclosure. *See, e.g., Douglas Oil Co., v. Petrol Stops Northwest*, 441 U.S. 211 (1979); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959); *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958). In these cases, this Court has repeatedly expressed its desire to safeguard the secrecy of grand jury proceedings and imposed exacting standards for any disclosure.

United States v. Procter & Gamble Co., 356 U.S. 677 (1958) is this Court's only case where the facts included the government's use, without a court order, of grand jury materials for civil purposes. The issue, however, concerned the standards for court-ordered release of grand jury materials to the private party. The propriety of governmental access to grand jury materials for civil purposes without a Rule 6(e) order was never discussed in the majority opinion. It cannot be assumed that the silence of the Court meant approval of this practice. Indeed, in his concurring opinion, Justice Whittaker felt compelled to express, in strong language, that the secrecy afforded the grand jury by law must not be breached either by government or defense counsel, absent court order. *Id.* at 685. The majority opinion, had it intended approval of governmental access to grand jury matters as of right for civil purposes, could have stated its position by addressing Justice Whittaker's opinion. Rather, it chose to remain silent on this issue. It is difficult, if not impossible, to draw from the majority's silence any inference of approval of automatic government access to grand jury materials for civil use.

The few lower federal court opinions to face the issue of disclosure of grand jury materials to civil government attorneys as a matter of right are split in their decisions. Besides the Ninth Circuit, those rejecting such disclosure as a matter of right include *In Re Grand Jury*, 82 F.R.D. 70 (N.D. W.Va. 1979) and *Capitol Indemnity Corp. v. First Minnesota Construction Co.*, 405 F. Supp. 929 (D. Mass. 1975). Those sanctioning civil government access without court order include *In Re Grand Jury (LTV)*, 583 F.2d 128 (5th Cir. 1978) (per curiam); and *United States v. General Electric Co.*, 209 F. Supp. 197 (E.D. Pa. 1962).

For disclosure as a matter of right under Rule 6(e), two conditions must be met. First, the disclosure must be made to an attorney for the government or assisting government personnel. Fed. R. Crim. P. 6(e)(3)(A)(i) and (ii). Attorney for the government is defined as "The Attorney General, an authorized assistant of the Attorney General, a United States Attorney, or an authorized assistant of a United States Attorney . . . ." Fed. R. Crim. P. 54(c). Second, the disclosure must be made for use in the performance of such attorney's duty.

The only duty of the government attorney specifically mentioned in Rule 6(e) is the duty to enforce federal criminal law. Fed. R. Crim. P. 6(e)(3)(A)(ii). To be sure, the first part of the automatic disclosure exception to grand jury secrecy does not explicitly define the duty of the attorney for the government. Fed. R. Crim. P. 6(e)(3)(A)(i). The meaning of such duty, however, is made clear from the history of Rule 6(e).

The original Rule 6(e), which became effective in 1946, entitled attorneys for the government access to grand jury materials without a court order. The Advisory Committee on Criminal Rules that drafted the original Rule 6(e) explained that the provision for disclosure to attorneys for the government was included because "they may be present in the grand jury room during presentation of evidence." Advisory Committee Notes on Fed. R. Crim. P. 6(e) (1946), 18 U.S.C. App. at 1411. Because a grand jury can only legitimately be used for criminal investigations, *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958), an attorney for the government who could properly be present in the grand jury room would be acting in performance of his duty to enforce federal criminal law. On the other hand, an attorney for the government with no criminal law enforcement responsibility may not be present in the grand jury room. Fed. R. Crim. P. 6(d). The Brief for the

Government concedes as much (Brief for the United States, 24 at n.19).

Accordingly, it is the criminal law enforcement duty of a government attorney that authorizes presence in the grand jury room and it is the same duty that permits automatic access to grand jury materials. There is no indication in the Advisory Committee Notes to the original Rule 6(e) that the disclosure of right provision for government attorneys was intended to include disclosure for civil as well as criminal duties. The clear intent of the drafters of the original Rule 6(e) was to authorize automatic disclosure only to government attorneys whose criminal duties required use of grand jury materials.

Furthermore, the wide range of duties that may be assigned to an attorney for the government as defined in Rule 54(c) means that "attorney for the government" cannot be the only test for automatic disclosure under Rule 6(e). For example, in *Capitol Indemnity Corp. v. First Minnesota Construction Co.*, 405 F. Supp. 929 (D. Mass. 1975), an Assistant United States Attorney was assigned to represent an administrative agency, the Department of Housing and Urban Development (HUD). In the course of performing his duties, the Assistant United States Attorney sought grand jury materials to assist him in his capacity as counsel for HUD in a civil action. The federal district court denied release of the grand jury materials to the Assistant United States Attorney, stating:

> By permitting a "civil" assistant U.S. Attorney carte blanche to share the fruits of his "criminal" counterpart's grand jury inquiry, the twin dangers exist that the grand jury could be used improperly as a vehicle for civil discovery and that the secrecy of the grand jury's deliberations could be compromised. *Id.* at 932.

It is clear that the application of Rule 6(e) disclosure to attorneys for the government turns on the scope of the government attorney's professional responsibilities rather than merely upon his status as a Rule 54(c) attorney. It is unlikely that the drafters of Rule 6(e) intended a blanket disclosure of grand jury materials for any and all purposes simply by reference to the definition of attorney for the government contained in Rule 54(c). It is more likely and far more consistent with the policy of grand jury secrecy, that Rule 6(e) confines automatic access only to those whose duties as attorneys for the government are directly related to the function of grand jury investigations—the enforcement of federal criminal law.

The subsequent amendment of Rule 6(e) in 1977 confirms this interpretation of "duty" in Rule 6(e). This Court proposed an amendment that provided for automatic disclosure of grand jury materials to government personnel by adding the following language: "For purposes of this subdivision, 'attorneys for the government' includes those enumerated in Rule 54(c); it also includes such other personnel as are necessary to assist the attorneys for the government in the performance of their duties." 425 U.S. 1157, 1161 (1976).

The proposed amendment, like the original Rule 6(e), used the word, "duties," without defining what duties were intended. The Advisory Committee on Criminal Rules that drafted the proposed amendment indicated quite clearly though that the "duties" referred to in the proposed amendment were criminal law enforcement duties. The Advisory Committee stated that the "proposed amendment reflects the fact that there is often government personnel assisting the Justice Department in grand jury proceedings." Advisory Committee Notes on Proposed Amendment to Fed. Crim. R. 6(e) (1976), 18 U.S.C. App. (Supp. IV) at 611. The Advisory Committee added that the amendment would be "subject to the qualification that the matters disclosed be used only for purposes of the grand jury investigation." *Id.* Because the Advisory Committee must have been aware of the fact that grand jury proceedings are proper only for criminal investigations, it appears clear that it intended to continue to limit the automatic disclosure exception to grand jury secrecy to government attorneys and personnel who were assisting the grand jury in its criminal investigations.

Before the proposed amendment could take effect, Congress acted to postpone its effective date and then revised Rule 6(e). The present version of Rule 6(e) reflects that Congressional modification. The legislative history in both the House and the Senate indicates that Rule 6(e) was intended to authorize disclosure of grand jury proceedings to government attorneys without a court order only for criminal law enforcement.

The Senate Committee was explicit in stating that civil use of grand jury materials requires a court order. In answering concerns about revealing grand jury materials to government personnel who may be more interested in civil law enforcement, the Report of the Senate Committee states:

> [T]he Rule seeks to allay the concerns of those who fear that such prosecutorial power will lead to misuse of the grand jury to enforce non-criminal Federal laws by (1) providing a clear prohibition, subject to the penalty of contempt and (2) requiring that a court order under paragraph (c) is obtained to authorize such a disclosure.

S. Rep. No. 95-354, 95th Cong., 1st Sess. 8 (1977).

The Senate Committee recognized that civil use of grand jury proceedings can be legitimate, but the Committee suggests that Rule 6(e), as amended, would require a court order when disclosure for civil litigation purposes was intended. The Committee Report states: "Accordingly, the Committee believes and intends that the basis for a court's refusal to issue an order under paragraph (C) to enable the government to disclose grand jury information in a non-criminal proceeding should be no more restrictive than is the case under prevailing court decisions." *Id.* at 8. Although this statement concerns the standard for the court to apply in ordering disclosure under Rule 6(e)(3)(C), it assumes that a court decision is required prior to disclosure for non-criminal purposes. Furthermore, nothing in the Senate Report suggests that attorneys for the government are entitled to use grand jury materials in civil cases without judicial authorization.

The hearings before the Subcommittee on Criminal Justice of the House Committee on the Judiciary also indicate that Congress intended judicial oversight in civil use of grand jury materials. The Subcommittee was led by key witnesses to believe that grand jury materials would not be used for civil purposes unless approved by court order. For example, Mr. Richard L. Thornburgh, the Acting Deputy Attorney General in charge of the Criminal Division, presented the Justice Department's view of the proposed Rule 6(e). Mr. Thornburgh stated:

> Now, when you begin to move beyond the parameters of that particular investigation, we get to the point that you and I both have some trouble with. The cleanest example I can think of where a 6(e) order is clearly required is where a criminal fraud investigation before a grand jury fails to produce enough legally admissible evidence to prove beyond a reasonable doubt that criminal fraud ensued.
>
> It would be the practice of the Department at that time to seek a 6(e) order from the court in order that that evidence could be made available for whatever civil consequences might ensue.

> If there were fraud against the Government: for example, there would be a civil right of the Government to recover penalties with respect to the fraud that took place. *Hearings* at 67.

Similarly, Professor Wayne LaFave, Reporter of the Advisory Committee on Criminal Rules that drafted the proposed amendment for the Supreme Court, stated that "to the extent that administrative agencies and the U.S. attorneys may have somewhat overlapping responsibilities, I don't think it follows that the U.S. attorney can make disclosure to other people." *Hearings* at 93.

In reliance upon such assurances, the House Subcommittee on Criminal Justice approved the modification of Rule 6(e) believing that the rule, as amended, would not change what they were led to believe was the practice with respect to automatic disclosure. Remarks of Representative Mann, Chairman of the House Subcommittee on Criminal Justice (123 Cong. Rec. 25194). Based on assurances of witnesses such as Professor LaFave and Mr. Thornburgh, the Subcommittee understood that the prevailing practice of disclosing grand jury material for non-criminal purposes only with prior judicial authorization would be continued under the amendment.

There is nothing in the legislative history to suggest that Rule 6(e) disclosure to attorneys for the government was intended to authorize release of grand jury materials for non-criminal purposes. Nor is there any indication in the legislative history that the "duty" of the government attorney in Rule 6(e)(3)(A)(i) was intended to be different or broader than the "duty to enforce federal criminal law" in Rule 6(e)(3)(A)(ii). Rather than suggesting substantive differences in the duties referred to in each subsection, the different language reflects the legislative process by which Rule 6(e) was amended. *See* 425 U.S. 1157, 1161. It was Congress that added "duty to enforce Federal criminal law" to the present version of Rule 6(e). The failure to define duty the same way in both subsections is explained by the fact that Congress was concerned with the proposed amendment's extension of disclosure to nonattorney government personnel and not with the disclosure to attorneys for the government exception. *See* S. Rep. No. 95-354, 95th Cong., 1st Sess. 6-7 (1977). That Congress defined "duty" only in the subsection that deals with government personnel and not in the subsection that concerns attorneys for the government is therefore understandable.

In light of the Congressional concern for grand jury secrecy and the potential "misuse of the grand jury to enforce non-criminal Federal laws," S. Rep. No. 95-354, 95th Cong., 1st Sess. 8 (1977), Rule 6(e) should be construed to restrict automatic access to grand jury materials by attorneys for the government to criminal law enforcement. In civil litigation, government counsel should be required, like lawyers for private parties, to apply for a court order under Rule 6(e)(3)(C)(i) to obtain the release of otherwise secret grand jury materials. This approach not only recognizes the importance of grand jury secrecy, but also implements the concept of checks and balances between the judicial and executive branches of government in a manner which is particularly appropriate given the unique role of the grand jury. Such an interpretation of Rule 6(e) will not preclude government attorneys charged with duties to enforce civil law from obtaining grand jury information when legitimate reasons exist. What it will do is preserve the traditional, common law role of the judiciary in supervising the disclosure of otherwise confidential grand jury information.[9]

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[9] Indeed, where Congress has seen a need to allow government investigation for the enforcement of civil statutes, it has enacted legislation authorizing the same. *See* The Antitrust Civil Process Act, 15 U.S.C.A. § 1310, *et seq.* Its failure to legislate more gen-

Whether the individual seeking disclosure of grand jury materials represents a private litigant or is a government attorney with civil enforcement responsibilities, the standard which should guide the court should protect the policy interests underlying the secrecy of the grand jury and continue the common law practice of meaningful judicial supervision of disclosure in order to prevent the potential of grand jury abuse. Because the determination of whether such a standard was met here turns upon the particular facts of the case, this issue can be most effectively discussed by the parties and will not be addressed by the Association.

CONCLUSION

This Court should construe Rule 6(e) to require a court order as a means by which attorneys for the government may obtain grand jury materials for use in non-criminal litigation. Such a construction is compatible with the intent of the framers of the rule and the policy of grand jury secrecy. This interpretation will not prevent the Government from obtaining such materials when a legitimate reason for their use in civil law enforcement activities exists. Rather, it will merely provide for continuation of the policy of judicial approval and

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erally suggests all the more that free access to grand jury materials was never the intent of Congress.

Requiring a Court order for the disclosure of grand jury information is especially important in areas where both criminal and civil remedies are available. In those instances the Government may have alternative investigative powers whose use depends upon the sanction sought. The existence of civil and criminal remedies supports the need for court supervision of the disclosure of grand jury materials because of the potential for misuse of the grand jury as a means of collecting evidence for the purpose of pursuing civil remedies. Court-ordered disclosure of grand jury materials keeps clear the distinction between civil and criminal procedures; protects against grand jury abuse; and insures that the requirements of grand jury secrecy will be given full consideration before any disclosure is made.

supervision in instances where grand jury secrecy is to be abrogated for use in non-criminal proceedings. For these reasons the Amicus Curiae, American Bar Association, submits that the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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QUESTIONS FROM CHAIRMAN THURMOND TO PETER VAIRA

Question. One difference between the two bills being examined today is that S. 1676 charges the Department of Justice with the discretion and responsibility of requesting the court to order disclosure to outside agencies, while S. 1562 allows the agencies themselves to make the request of the court. Do you envision the grand jury as an extension and under the regulation, of the Court or the prosecution? Which entity would you charge with the responsibility of seeing that the criminal prosecution is conducted properly and who is responsible for seeing that grand jury secrecy is maintained?

Answer. The grand jury has always been regarded as an independent institution, guided by the executive branch in its search for truth, and supervised by the courts to insure due process. The executive branch has the initial responsibility to insure secrecy since the personnel of the executive originate the information brought to the grand jury and have responsibility of maintaining documents subpoenaed and transcripts of the testimony taken. Actions for breach of secrecy are always brought against the executive personnel. The courts supervise the use of the grand jury to see that the executive branch follows the federal rules of criminal procedure, and acts in a way to insure that the grand jury remains an independent body.

Question. Congress has traditionally placed constraints on the government's civil and administrative discovery and investigative authority. Do you believe that this legislation would allow government authorities to circumvent these statutory constraints? Do you believe the court should afford great consideration to these contraints, in considering whether to issue a Rule (6)(e)(c) disclosure order?

Answer. This legislation would encourage the civil and administrative bodies of the government to attempt to circumvent the normal procedure required by those agencies. The tendency would be to have the prosecutor's office issue a grand jury subpoena for large numbers of records; use the grand jury to question a few key witnesses and whether or not any criminal charges were brought, use the bulk of the evidence for civil cases—thus short-cutting the established procedure of the agency. The court, when presented with a disclosure order, should take into consideration that an established procedure exists for determining and adjudicating non-criminal matters in the agencies that recognizes procedural rights that are not afforded in grand jury procedure.

Question. Could a lesser standard than an adversarial showing of "particularized need" be used to allow access by non-criminal division attorneys and prevent abuse of grand jury authority—say, for example, in camera or ex-parte hearings, or perhaps, certain assurances by the appropriate Department of Justice official filed under seal, with the Court?

Answer. The Supreme Court in *United States v. Sells Engineering*, 463 U.S. 418 stated that nothing in the requirement to show particularized need requires a court to pretend that there are no differences between the government seeking information and private parties. The state of the law is such that where the requesting party is a public entity responsible for protecting the public welfare, the need for secrecy is considerably lessened. See, e.g. *United States v. Sobotka*, 623 F. 2d 764 (2nd Cir. 1980); *In re Disclosure of Testimony Before the Grand Jury (Truia)*, 580 F. 2d 281 (8th Cir. 1978). The machinery is in place for such showing. The courts are free to determine in what manner the presentation to demonstrate particularized need may take.

QUESTIONS FROM SENATOR CHARLES GRASSLEY TO PETER VAIRA

Question. Your statement indicates that your opposition to grand jury information access for congressional committees is based on an assumption that grand jury information provided to committees under this provision would be publicly disclosed. Do you have any reason for making that assumption?

Answer. The legislation provides that the information should be provided to whatever Congressional Committee that shows substantial need for it. Aside from the intelligence oversight committees, the business of the Congress is to make public its reasons for legislation. The nature of the legislative process is that its material be made known.

In the history of the use of the grand jury by prosecutors, there have been relatively few leaks of confidential material. The history of Congress handling confidential material is replete with improper disclosures.

Mr. James Hamilton, a former Watergate prosecutor, who testified before the Judiciary Committee on the same day as I did gave an excellent presentation on improper disclosure from Congress.

Question. If a system of safeguards for grand jury information was observed by congressional committees handling such information (not unlike the system employed by the Intelligence Committees for sensitive intelligence information), would you still object to the court determined congressional access provided in S. 1562? If so, please explain why.

Answer. I would object to such a procedure. The intelligence briefing procedure is vastly different than envisioned by S. 1562. Intelligence information is produced by intelligence officer briefings or documents drafted by intelligence officers. No raw data is supplied. There is no way to fashion a similar procedure for receiving grand jury matter. S. 1562 would permit wholesale disclosure of grand jury testimony by citizens, informants, victims relating information consisting of all degrees of hearsay, which is pure raw data. There would be no qualitative screening. No one specific committee will review grand jury information.

There is no similarity to the Intelligence Oversight Committees.

Question. You also raise concerns that congressional access to grand jury information could be unconstitutional. How would you suggest Congress exercise its constitutional function of oversight in the area of law enforcement activities without some limited access to grand jury information?

Do you believe this area of Executive Branch functions should be exempt from oversight?

Answer. The oversight function should be exercised through the questioning of officers of the Department of Justice or questioning individuals who are affected by DOJ procedure. If Congress wishes to criticize the executive for handling of certain matters, it is done by bringing the officers of the Department of Justice to public hearings, subpoenaing non-privileged documents, questioning DOJ officials in the forthright manner that good legislators are known for, and issuing public statements to the executive.

The examination of secret grand jury information about individual cases can add little to this open and forthright procedure. If there is an individual case that calls for micro-inspection, the Congress has its own wide-ranging subpoena power.

The Executive Branch functions should not be exempt from oversight.

QUESTIONS FROM CHAIRMAN THURMOND TO DAVID RUSSELL

1. MR. RUSSELL, YOU MAINTAIN THAT THE THRUST BEHIND S. 1676 IS CONVENIENCE AND COST SAVINGS TO THE JUSTICE DEPARTMENT IN BRINGING CIVIL ACTIONS. DO YOU DISPUTE THE CLAIM THAT COUNTLESS MERITORIOUS CIVIL ACTIONS WILL NEVER BE INVESTIGATED OR PROSECUTED BECAUSE OF THE LIMITATIONS IMPOSED BY SELLS AND BAGGOT? IS IT YOUR POSITION THAT THE NEED FOR GRAND JURY SECRECY OUTWEIGHS THE NEED TO BRING SUCH CIVIL ACTIONS?

We must indeed dispute the claim, Mr. Chairman, that "countless meritous civil actions will never be investigated or prosecuted because of the limitations imposed by Sells and Baggott." The Government's civil track record has been excellent. Agencies with significant civil enforcement roles, such as Justice, SEC, and IRS, are able to recruit from among the finest legal talent in the country. Their level of professional expertise is exemplary. They have access to and support from large and highly sophisticated investigative operations -- operations such as the various offices of Inspectors General which Congress has recently endowed with broad civil investigative powers of their own. And as Mr. Vaira pointed out in his oral presentation, based upon his experience as a U.S. Attorney, when an agency presents the results of an investigation to the grand jury, it does not lose its files on the case: it retains the information, and can readily put it to use in a civil context.

[I would also emphasize, as more fully discussed below in answer to your next question, that I respectfully disagree with your assumption that Sells and Baggott imposed some limitations on discloure which did not exist before.]

It is true that, in the aftermath of Sells and Baggott, a major storehouse of information will continue to be denied to the Government in various civil forums. I will even assume further -- solely for the purpose of argument -- that, as you suggest, if Federal civil law enforcement authorities were granted automatic access, grand jury materials so disclosed would be likely to form the basis for a number of meritorious civil actions which might not otherwise have been brought.

I would respectfully suggest, however, that under our system of government, not every device that will result in the bringing of additional meritorious civil or criminal actions is necessarily desirable. This country has erected a series of safeguards, contitutional and otherwise, designed to strike a balance between individual liberties and the need to expose wrongdoing. We accept as a Nation that in so protecting individual liberties, some wrongdoing may go unpunished.

The Framers were no strangers to these issues when they provided for a right against self-incrimination, a protection against unfounded searches and seizures, and a right to counsel. Likewise, safeguards such as the exclusionary rule, the requirement of proof beyond a reasonable doubt, and the entirety of the Federal Rules of Criminal Procedure, have no doubt been responsible for many a guilty party escaping sanction. And of course, Congress has erected various other protections in the civil arena.

It is our position that the need to bring the kind of civil actions you identify is outweighed not simply by the need for grand jury secrecy (without which, as I have mentioned elsewhere, many potential witnesses would be "chilled" into not coming forward), but also by the need to afford certain minimal protections to individuals whose property or other interests may be affected by such civil actions. The extraordinary powers of the grand jury were developed for use in tightly circumscribed, preliminary, secret criminal proceedings. The grand jury thus has an extraordinary ability to elicit evidence -- far beyond anything that the Congress has seen fit to grant explicitly in any civil forum. To turn over the fruits of these extraordinary powers to civil authorities would be to provide them with a backdoor through which they could obtain evidence unhindered by the usual limitations applicable in civil actions. Most importantly, they would be granted the luxury of obtaining evidence against a civil defendant unencumbered by the presence of the defendant's attorney -- thus neatly removing the "adversary" from the adversarial process. We doubt that the Congress would wish so extreme a result.

2. I WOULD LIKE TO ASK YOU TO SUBMIT IN WRITING ADDITIONAL VIEWS REGARDING THE PRUDENCE OF LEGISLATION WHICH WOULD SIMPLY RETURN TO THE STATE OF GRAND JURY DISCLOSURE PRIOR TO SELLS AND BAGGOT AND GO NO FURTHER IN EXPANDING SUCH DISCLOSURE. PLEASE EXPRESS WHAT YOU VIEW AS STATUS QUO ANTE SELLS AND BAGGOT. CAN YOU HAVE THAT TO US BY DECEMBER 3RD?

It is evident that the Court in Sells and Baggott did nothing to change the parameters of grand jury disclosure: it simply declined to expand them. The Court reaffirmed the traditionally accepted limitations on disclosure to Government civil attorneys -- the same limitations recognized and accepted by then Acting Deputy Attorney General Richard Thornburgh at the House hearings in 1977 (as noted by the Sells Court, at 463 U.S. 439). Since the Government has never had or exercised the authority to share grand jury materials wholesale with civil attorneys in the Justice Department or in other agencies, Sells and Baggott could have done nothing to take it away.

We would suggest that if the Committee wishes to ensure a return to the status quo ante Sells and Baggott, then it need do nothing, so that Government attorneys may continue to proceed through court orders based upon particularized need, as they have historically done. If the Committee wishes to go further and focus some active legislative attention on the situation before Sells and Baggott, it may do well to explore and resolve any intercircuit disputes regarding the scope of rule 6(e). For example, it might consider the conflict between the Sells Court's suggestion of some "reduced" standard of particularized need when it is the Government that is seeking disclosure (see NACDL testimony, at page 9-10), and the suggestion by other courts that the Government deserves no special treatment, particularly given the potential for abuse in civil cases.

GENERAL QUESTIONS

SOME AUTHORITIES CONTEND THAT ALLOWING UNFETTERED OR EASY ACCESS TO GRAND JURY INFORMATION FOR CIVIL AND ADMINISTRATIVE PROCEEDINGS WOULD CHILL THE OPEN PARTICIPATION OF GRAND JURY WITNESSES IF THE INFORMATION THEY COULD PROVIDE WOULD BE THE BASIS FOR SUBSEQUENT CIVIL OR ADMINISTRATIVE SANCTIONS AGAINST THEM. IS THIS A PROBLEM AND WHAT PROBLEMS DO YOU FORESEE IN GRANTING SWEEPING IMMUNITY AGAINST PROSECUTION OR SUIT? WOULD WITNESSES PARTICIPATE KNOWING THEY ARE ONLY IMMUNIZED AGAINST CRIMINAL PROSECUTION BUT NOT CIVIL?

Mr. Chairman, the "chilling effect" problem you describe is palpable, and would present an immense problem for the Government in maintaining the effectiveness of the grand jury system -- so much so that their advocacy of S.1676 seems rather self-defeating and ill thought out.

I have been engaged in the practice of Federal criminal law for more than seventeen years, and during that time, I have represented hundreds of grand jury witnesses. In my experience, when those witnesses learn that they must testify, their first concern is whether they can be granted immunity for their testimony. Most of these witnesses testify quite reluctantly. Indeed, based on my experience, approximately one-half of the witnesses who accept the profferred immunity and agree to testify would leap at any compelling excuse to decline. Thus, if the immunity conferred were not sufficient to quell their fears about their testimony being used against them at another time and in another place, they would not testify, and the Government would lose, I would submit, some 50 percent of the current effectiveness of the grand jury as an instrument of enforcement of the Federal criminal laws.

What the witnesses would seek, if S.1676 were enacted, would be full transactional immunity for any liability, civil or criminal, arising out of the conduct about which they had testified. But such immunity does not exist. Such transactional immunity as once did exist was legislated away by the Congress in the Organized Crime Control Act of 1970, P.L. 91-452, and was replaced with the far more limited "use immunity" now codified at 18 U.S.C. 6002. See Pillsbury Co. v. Conboy, 459 U.S. 248, 252-55 (1983). Moreover, a return to transactional immunity, or an even more liberal immunity encompassing civil actions, would seem highly unlikely, in light of the legislative history and the dissatisfaction with transactional immunity among prosecutors. See id., at 253, citing S. Rep. No. 91-617, p. 53 (1969).

SOME CONTEND THAT THE RISK OF "FISHING EXPEDITIONS" -- THE RANDOM SEARCH FOR CRIMINAL, CIVIL OR ADMINISTRATIVE VIOLATIONS -- WOULD BE CURTAILED IF DISCLOSURE TO NON-CRIMINAL DIVISION ATTORNEYS AND PERSONNEL WERE NOT ALLOWED, OR ALLOWED ONLY AFTER A SHOWING OF "PARTICULARIZED NEED".

BOTH PIECES OF LEGISLATION CONTAIN LANGUAGE THAT WOULD REDUCE THE SHOWING TO ONE OF "SUBSTANTIAL NEED'. DOES THIS CREATE A GREATER RISK OF GOVERNMENT "FISHING EXPEDITIONS". HOW WOULD AN OUTSIDE AGENCY OR CIVIL DIVISION ATTORNEY ARGUE FOR INFORMATION WITH ANY DEGREE OF "PARTICULARITY" -- WHEN THE INFORMATION IS IN THE SOLE POSSESSION AND CONTROL OF CRIMINAL PROSECUTOR?

On this issue, I should clarify a potential misunderstanding that may have arisen at the hearing. We do not contend that under current law there is or has been any substantial risk of "fishing expeditions." The requirement of particularity, firmly established by the Supreme Court almost three decades ago, guards against it. See United States v. Procter and Gambel Co., 356 U.S. 677, 683 (1958).

Rather, it is our concern that by removing the element of particularity in the future, and substituting the notion of "substantial need," the Congress would be permitting the disclosure of a grand jury witness's entire testimony, or of the entire grand jury record, solely upon the Government's showing that it had some substantial need for some portion of the materials disclosed. The court would be under no compulsion to redact those portions of the record as to which no specific need had been demontrated. As a result, the Government would receive more information than it needed, and would be free to rifle through the excess at will, in a search for material upon which to base new civil actions.

On the question of whether an outside agency would be able to argue for information with particularity when the information is in the sole possession and control of the criminal prosecutor, we would suggest that, as a practical matter, no such obstacle currently exists. There is a certain amount of inevitable exchange of information between criminal and civil authorities in connection with any grand jury proceeding. In a tax matter, for example, the prosecutor would require extensive support from IRS investigators in presenting the matter to the grand jury, and at the end of the day those investigators would take their files and go back to their offices and mingle with their colleagues. In the process, it would easily become common knowledge that the office is participating in a grand jury investigation, and that certain individuals, charges, and files are involved. Indeed, it is unrealistic to expect Government lawyers not to talk to one another or to have no awareness of the activities of their colleagues working in closely related areas. The kind of information so exchanged constitutes an ample starting point for a showing of particularized need.

If the Committee has any doubts about how this informal process works between various agencies, we would suggest that further hearings would be appropriate, at which time agency representatives could describe the process in detail, and discuss their individual methods of dealing with the requirement of particularized need. On the present record, however, we would strongly suggest that there is no evidence of a government-wide problem in this regard.

COULD A LESSER STANDARD THAN AN ADVERSARIAL SHOWING OF "PARTICULARIZED NEED" BE USED TO ALLOW ACCESS BY NON-CRIMINAL DIVISION ATTORNEYS AND PREVENT ABUSE OF GRAND JURY AUTHORITY -- SAY, FOR EXAMPLE, IN CAMERA OR EX-PARTE HEARINGS, OR PERHAPS, CERTAIN ASSURANCES BY THE APPROPRIATE DEPARTMENT OF JUSTICE OFFICIAL FILED UNDER SEAL, WITH THE COURT?

Based upon my exprerience and observations, the devices you describe are already in practice by the Justice Department. When Government civil attorneys from any agency come forward with a particularized need request, it is usually handled by the court on an ex parte, non-public basis. When such requests have been made in connection with a client of mine, I have never been made aware of it until after the fact.

QUESTIONS FROM SENATOR CHARLES GRASSLEY FOR:

David W. Russell -- National Association of Criminal Defense Lawyers

1. You mentioned in your testimony the elaborate system the Intelligence Committee employs for securing sensitive information. If the Judiciary Committee developed a similar system of safeguards for grand jury material for which a court has determined the Committee has "substantial need", would you support congressional access? If not, please explain your reasons.

    No, we could not support such access. As I suggested in my written testimony, even the most sophisticated safeguards presently extant on Capitol Hill -- those employed by the Intelligence Committees -- have proven fallible. And as a practical matter, it appears to us highly unlikely that other committees and committee staffs which lack the Intelligence Committees' primary orientation to confidential materials will feel much compulsion or have much occasion to develop the necessary near-religious deference to security procedures.

    It is worth bearing in mind a fundamental difference in "mindset" between investigations conducted by the security-oriented committees (such as Intelligence and Armed Services), where a primary goal is to protect confidential, national security information, and those conducted by other committees where an equally primary goal is to make the matter public, the better to put the offending agency's feet to the fire. Such is the case, it must be recognized, with much of the Judiciary Committees' oversight activities concerning Justice Department investigations, such as the E.F. Hutton and General Dynamics cases.

2. You also mentioned in your testimony that Congress should wait to review grand jury information until the investigation is closed. Are you aware that the current interpretation of Rule 6(e) is that Congress may not have access to such information whether the investigation is open or closed? Could you support an access provision for congressional committees that was limited to closed grand jury investigations? If not, please explain.

    We do recognize that Congress can play a vital role in conducting oversight of agency investigations -- that is, by "investigating the investigator," to ensure that the process is working properly. The Judiciary Committees in particular have demonstrated that they can serve a useful function in overseeing significant Justice Department law enforcement initiatives.

It is our understanding that, despite rule 6(e)'s limitation to "judicial proceedings," the Justice Department has evidenced some willingness to share information, outside the formal scope of rule 6(e), with respect to grand jury investigations which have terminated. We can speculate that, whatever the precise limitations of rule 6(e), the Department is not unaware of the Congress's subpoena power, and may be willing to make certain accomodations in the interests of avoiding a confrontation -- particularly when the confrontation would be with a House controlled by the President's own party, and particularly when a sensitive election cycle is under way.

If, upon deep reflection, the Committee determines that proper exercise of its oversight function requires some tampering with what the Supreme Court calls "the indispensable secrecy of the grand jury," we would strongly suggest certain minimum protections. For example, congressional committee access should be absolutely limited to grand jury investigations which have terminated. Moreover, in the interests of preserving secrecy after disclosure, "redisclosure" by a congressional committee to another entity should be made expressly subject to the same rule 6(e) requirements as govern the intital disclosure. Also, the purpose of such disclosure should be expressly limited to the legitimate exercise of Congress's oversight function -- that is, where the purpose of the congressional investigation is to "investigate the investigation," to examine the conduct of the investigating agency, rather than to usurp the Executive Branch's investigative role by reexaming the conduct of the target of the underlying investigation. And of course, as was stressed in our written presentation, the court's role in controlling and supervising disclosure based upon a showing of particularized need must be preserved.

But before any such action is taken to whittle away at grand jury secrecy, we are confident that the Committee will wish to give its most serious attention to an important factor I discussed in my oral presentation -- the potential chilling effect on prospective grand jury witnesses. By making such an inroad into grand jury secrecy, the Congress may end up hampering, rather than improving, the Government's ability to ferret our wrongdoing in a variety of contexts.

3. In the question and answer period of the hearing, you indicated that civil attorneys would likely have no problem convincing a court of "particularized need" when original documents are all considered Rule 6(e) material and there is no alternative method for access. Under the current interpretation of Rule 6(e), when Congress is in a similar situation, i.e. documents are said to have been turned over to a grand jury and no duplicates are available, Congress will not be able to obtain access under Rule 6(e) because it is not involved in a "judicial proceeding". How would you recommend Congress handle this type of predicament? Would you support a special allowance for Congress under these circumstances as long as the requisite factors of appropriate oversight could be shown?

See answer to question 2.

Senator LAXALT. Thank you very much, gentlemen.

[Whereupon, at 11:35 a.m., the committee was adjourned.]

APPENDIX

Statement of
Philip E. Coates
Associate Commissioner (Operations)
Internal Revenue Service
Before The
Senate Judiciary Committee

Mr. Chairman and Members of the Senate Judiciary Committee:

I appreciate the opportunity to present a statement for the record in favor of Senate bill S. 1676, to amend the Federal Rules of Criminal Procedure by expanding in a prudent manner the conditions for grand jury disclosure under Rule 6(e).

The bill will be beneficial to effective law enforcement, the conservation of scarce resources, necessary revenue production and at the same time will retain the necessary safeguards to prevent grand jury abuse.

Effective Law Enforcement

The Internal Revenue Service plays a key role in current enforcement efforts relating to organized crime drug enforcement task forces and strike forces, enforcement of the Bank Secrecy Act (Title 31) which includes money laundering activities, as well as having primary jurisdiction in combatting abusive tax shelter promotions, illegal tax protesters, etc.

The Service contributes significant resources to assist attorneys for the government in grand jury investigations in each of the above mentioned areas. In particular, the use of grand juries to investigate organized crime, drug trafficking and Bank Secrecy Act cases has been found to be the most effective way of coordinating the efforts of diverse government agencies having investigative jurisdiction in these type cases.

The Service has two main investigative programs: the Special Enforcement Program (SEP) which involves what could be categorized as organized crime or drug trafficking activities, and the General Enforcement Program (GEP) which involves abusive tax shelter promotions, illegal tax protesters, and other general criminal tax activities.

As of September 30, 1985, SEP cases accounted for 38% of the open criminal investigations (2,018 cases out of a total of 5,315) with the Service devoting 48% of direct investigative time to such cases. Of the 2,018 open SEP cases, 1,359 (67%) were being investigated by grand juries. A smaller number of GEP cases are conducted by grand jury (376 cases representing 11% of total GEP inventory as of September 30, 1985); however, the GEP cases under grand jury investigation generally involve significant compliance problems such as abusive tax shelter promotions and illegal tax protester schemes, or involve sophisticated fraudulent schemes and substantial liabilities such as corporate fraud. All totaled, 33% of the Service's criminal investigations, as of September 30, 1985, were being conducted by grand juries.

Attached to this statement is a summary of our grand jury investigative results for the fiscal years ending September 30, 1984, and September 30, 1985, respectively.

Current Law and Civil Tax Administration

In addition to the criminal abuses that are the subject of the grand jury investigations, the vast majority of the 1,735 Service cases under grand jury investigation as of

September 30, 1985 also have substantial civil tax ramifications. Rule 6(e) now provides that matters occurring before the grand jury may be disclosed for civil use if the purpose is "preliminarily to or in connection with a judicial proceeding." In 1983, the Supreme Court handed down two decisions that adversely affected the Service's ability to efficiently and effectively carry out its civil tax enforcement responsibilities. First, in United States v. Baggot, 463 U.S. 476 (1983), the court determined that IRS civil examinations were not "preliminarily to or in connection with a judicial proceeding." Thus, under the current interpretation of the rule, the Service is not permitted access to matters occurring before a grand jury for the purpose of examining civil taxes unless the "grand jury material" becomes a matter of public record.

In the second case, United States v. Sells Engineering, Inc., 463 U.S. 418 (1983), the Court determined that the government must show "particularized need" before obtaining grand jury material for civil purposes even if the "preliminarily to" test has been met. Neither the Supreme Court nor the appellate courts have developed a hard and fast test for what constitutes "particularized need", but it is something more than a need to avoid duplication of government investigative time and resources (Sells), and a recent Second Circuit opinion [United States v. John Does 1-V, No. 85-6054 (2nd Cir. filed Sept. 24, 1985)] indicates that it may be as strict as a requirement that there be no alternative means of obtaining the information.

It should be pointed out that there was no issue of grand jury abuse prior to Baggot and Sells. Until then, the disclosure of grand jury information for use in related tax audits was a regular part of the grand jury process. There is no evidence that such disclosures compromised the secrecy of such information, intimidated witnesses from testifying or in any other way compromised the integrity of the grand jury process.

Impact on Revenue Production

The loss of revenue caused by the inability of the Service to obtain Rule 6(e) orders is substantial. The inability to obtain access to "grand jury material" that has not become a matter of public record prevents the Service from even knowing there are existing civil liabilities that have not been asserted. Although the Department of Justice uses its best efforts to insure that the Service receives all information relevant to a civil liability that may be disclosed under the law, there is no question that revenues are lost because of the operation of the present Rule. At the time of the Baggot and Sells decisions, the Service had 760 cases involving more than $724 million in deficiencies in which it had obtained some or all of the information necessary to assert the deficiencies by means of Rule 6(e) orders. While the Service is able to utilize the information in the majority of those cases because of the nonretroactive application of the Baggot and Sells decisions, it is unlikely that the Service would obtain this information under the present operation of the Rule. Furthermore, although we have not captured the total of the potential deficiencies that could have been subject to orders since that time, it is reasonable to assume that millions of dollars have been lost. The irony of this situation is that most of the individuals profiting from this state of affairs are engaged in illegal activities and are not being held accountable for the taxes they should be paying.

We would also point out that the Service has substantial responsibility to enforce the Bank Secrecy Act and many if not most of these investigations involve grand juries. Although some tax investigations are worked concurrently, many cannot be for a number of valid reasons. In these cases, the information developed cannot be made available for civil tax purposes. Again, while no exact figures are available, the revenue loss is substantial.

Individuals who engage in illegal activities, other than in crimes of passion, do so for profit. To allow these individuals to escape paying taxes on hugely profitable activities that bring misery to our society is not good law enforcement or public policy.

Conservation of Scarce Resources

Without the ability to obtain Rule 6(e) orders to determine civil tax liabilities, the Service is faced in many situations with having to duplicate the efforts and resources invested in these grand jury investigations, with this approach being possible only where the Service can develop independent leads to the same information developed by the grand jury. This is at best a duplication of resource application and at worse impossible.

The problem is demonstrated by examining the statistical results of grand jury investigations in which the Service has been involved. During fiscal year 1985, the Service assisted in 2,137 completed grand jury investigations. The vast majority (71%) resulted in prosecution recommendations; however, 618 cases (29%) were discontinued or were closed with a nonprosecution recommendation. As a result, there is no possibility that any material developed by the grand jury that may be relevant to the potential civil liabilities of the targets of the discontinued and nonprosecution cases will ever become available to the Service by becoming a part of a public record. Since investigations may be discontinued or result in nonprosecution recommendations for reasons unrelated to an individual's liability for taxes (for example, ill health, insufficient evidence of criminal willfulness, cooperation of witnesses against more significant targets, etc.), it is likely that relevant civil tax information remains buried in the grand jury.

In addition, for those grand jury cases where prosecution was recommended, 327 were declined for prosecution by the Department of Justice. Resources have to be duplicated in all of these cases to determine tax deficiencies, and this can only be accomplished where independent leads can be developed.

Even when a grand jury investigation results in an indictment, only a limited amount of information may become available for civil purposes. This occurs because a very high percentage of tax prosecutions are resolved by means of guilty pleas. In fiscal year 1985, 80% of the convictions obtained in Service cases were the result of guilty or nolo pleas. This percentage is generally true for the narcotic and shelter cases that form the vast majority of the cases investigated by grand juries. Although grand jury information may become part of the public record through a Rule 11 hearing or the sentencing process, only information that is relevant to assist the court in accepting the plea or fashioning a sentence may properly be placed in the record. United States v. Manglitz, 85-2 USTC Par.9723 (4th Cir. 1985). Thus, although the practice of resolving prosecutions by pleas is essential to the efficient operation of the criminal judicial process, it serves to shield the Service from material relevant to meeting its civil enforcement responsibilities. As a result, it is not uncommon to apply duplicate resources in these situations to obtain information that would be available from a Rule 6(e) order. The proposed bill would accomplish this purpose and enable the Service to conserve scarce resources.

Impact Within the Service

A nonexclusive list of problems encountered as a result of the present Rule would include:

(1) The complete inability in some cases of assessing and collecting the civil liabilities due and owing by a grand jury target;

(2) In other cases, the duplication of investigative resources and time in reconstructing the investigation for civil purposes;

(3) Difficulty in ascertaining the correct civil liability even when settlement of such liabilities has been made a condition to either acceptance of a plea bargain by the government or imposition of a sentence by a court;

(4) Inability to ascertain when a jeopardy assessment or termination action should be taken against narcotic traffickers or organized crime target;

(5) Inability to obtain information necessary to revoke or deny requests for tax exemption;

(6) Difficulty in coordinating civil examinations and actions on subjects related to targets under grand jury investigation (e.g., investors in abusive tax shelters where the promoter is under grand jury investigation);

(7) Inability to file adequate proofs of claim when a grand jury target files for bankruptcy; and,

(8) Difficulty in managing resources, effecting personnel actions, and conducting normal internal audits where grand jury material is relevant to such matters.

Safeguards to Prevent Grand Jury Abuse

Concerns about possible abuse of the grand jury process for noncriminal purposes should be handled by means other than the outright denial of information relevant to a valid civil purpose. Neither the Service nor the Department of Justice are interested in utilizing their limited criminal investigative or prosecutorial resources for solely civil purposes. Grand jury abuse concerns should be addressed directly by the courts in the exercise of their supervisory powers over the grand jury process, rather than indirectly through a rule that results in either the loss or expenditure of substantial government revenues.

It must be emphasized again that the Baggot decision was not based upon a finding of grand jury abuse. It clearly and simply involved a determination that the present rules do not encompass an Internal Revenue Service civil examination in the definition of preliminary to or in connection with a judicial proceeding. The proposed legislation would expand the disclosures permissible to include a new category, whereby an attorney for the government, when so permitted by a court upon a showing of substantial need, could obtain a disclosure order permitting us to obtain such information in relation to any matter within the jurisdiction of relevant agencies.

The Service recognizes and adheres to the principle that the grand jury's purpose is solely criminal. At the same time, practically all criminal tax investigations have significant civil ramifications that coexist with the criminal aspects. Effective law enforcement and tax administration require that the government make full use of all available information. It makes little sense to expend substantial government resources in accumulating evidence of significant tax liabilities during a grand jury investigation of criminal activity and to then preclude the use of the evidence to assert a civil deficiency. The present Rule does just that. As a result, the civil liabilities in some cases are either never assessed, or the government is forced to duplicate the expense and effort of determining the liabilities.

We would also note that the Service has long had detailed procedures to protect the integrity and secrecy of matters occurring before the grand jury. The Service would be pleased to submit a copy of these procedures for the record at the Committee's request (Internal Revenue Manual 9267).

Furthermore, the Service is not only bound by the existing grand jury sanctions, but all information received in connection with a tax matter is also covered by the confidentiality provisions of section 6103 of the Internal Revenue Code. This section establishes such information as confidential and prohibits its disclosure except as authorized therein.

Essentially, concerns about the possible abuse of the grand jury process and grand jury secrecy can be handled by existing sanctions. Nothing in the proposed bill reduces or changes those sanctions in any way.

Additional Comments

Another area of concern to the Service is the standard of need that must be demonstrated to justify release of the grand jury material. We do not object to the "substantial need" standard that is set forth in proposed subsection 6(e)(3)(C)(v). We would urge the Committee, however, to make the legislative record clear that "substantial need" is a lesser standard than the "particularized need" standard that is set forth in subsection (1), and that courts can and should consider the difficulty and expense to an agency or department of obtaining the information by alternative means.

One of the more perplexing problems presented by Rule 6(e) is the definition of what constitutes a "matter occurring before the grand jury." Although S. 1676 does not address that problem, the amendment that is proposed will solve other difficult problems faced by the Service and other agencies since the Supreme Court's decisions in the Baggot and Sells sells. The proposed amendment should also serve to lessen the problems faced because of the unsettled state of the law regarding the definition of grand jury matters.

Summary

The Service is proud of the continuing contribution it has made to effective law enforcement, especially in light of the difficulties created by Baggot and Sells. In fact, despite the problems raised by these cases, Service participation in grand juries has not decreased. It would be unfortunate, however, if this commitment to law enforcement required the continued loss of revenue and duplication of enforcement efforts as outlined in this statement. We therefore support S. 1676 as a necessary but prudent resolution to the problems created by the Baggot and Sells decisions.

Let me conclude by again expressing my appreciation for the opportunity to present this statement. We would be glad to answer any questions the Committee may have or supply any information the Committee may require.

Attachment

Criminal Investigation - Grand Jury

	FY 84	FY 85	Total
Investigations Completed	1852	2137	3989
Prosecution Recommendations	1281 (69%)	1519 (72%)	2800 (71%)
Non-Prosecution	21 (1%)	33 (1%)	54 (1%)
Discontinued	550 (30%)	585 (27%)	1135 (28%)
Declinations	135	192	327
Indictments/Informations	957	1150	2107
Convictions	704	890	1594
Sentenced	710	892	1602

November 25, 1985

Senator Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The American Civil Liberties Union (ACLU) appreciates the opportunity to comment on S.1676 the "Grand Jury Disclosure Amendments of 1985." The ACLU with a membership of over two hundred and fifty thousand Americans, is dedicated to the protection of constitutional values, including the protection of individual freedom against the unrestricted power of the government.

The ACLU opposes S.1676 because it is undesirable, giving the government an unnecessary and unfair advantage over the individual in civil litigation, and, because the bill has the potential of corrupting and distorting the true uses of the grand jury system.

The Bill

S.1676 would make it easier to distribute information gathered in a grand jury to Department of Justice Attorneys for civil purposes. S.1676 would effectively overrule the Supreme Court's decisions in United States v. Sells Engineering, Inc. 77 L Ed 2d 743 (1983) and United States v. Baggot 77 L Ed 2d 785 (1983). These cases construed rule 6(e)(3) of the Federal Rules of Criminal Procedure. Generally, evidence produced in grand jury deliberations is secret. There are two relevant exceptions: 1) the (A)(i) exception, and 2) the (c)(i) exception. Rule 6(e)(3)(a)(i), the [(a)(i)] exception allows disclosure upon a strong showing of particularized need. The party seeking disclosure must show that the material sought is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that the request is narrowly structured. The (c)(i) exception also allows disclosure "preliminary to or in connection with a judicial proceeding."

Both exceptions were interpreted recently by the Supreme Court in cases which this legislation seeks to overturn.

In your letter of November 12, 1985 you also ask that the following be considered:

(2) Access by other Executive Departments and agencies for judicial ajudicative and administrative proceedings and

(3) Access to material by Congressional Commitees and their staffs. The addition of these last two proposals makes a bad bill worse.

GRAND JURIES ARE POWERFUL BODIES, AND THEIR USE FOR CIVIL DISCOVERY WOULD BE VERY INAPPROPRIATE

In United States v. Proctor & Gamble, Co., 356 U.S. 677, 683 (1958), the Supreme Court set forth the absolute rule that a criminal grand jury may not be convened for purposes of conducting civil discovery:

> It [the trial court] undoubtedly was influenced by the fact that the prosecution was using criminal procedures to elicit evidence in a civil case. If the prosecution were using that device, it would be flouting the policy of the law.

Granting a Civil Division attorney the absolute right to inspect all grand jury materials would result in a severe danger that such "flouting the policy of the law" would become commonplace, and that the grand jury would often be used as just another weapon in the Government's civil discovery arsenal. The investigative powers of a grand jury are far in excess of those granted any federal agency and even extend beyond those granted a civil litigant under the Federal Rules of Civil Procedure. For example, a witness has no right to have his or her counsel present when testifying before a grand jury, In re Groban, 352 U.S. 330, 333 (1956); no materiality or relevance objections may be interposed to any questions asked a grand jury witness, Blair v. United States, 250 U.S. 273, 282 (1919); a subject under grand jury investigation has no right to cross-examine anyone who may give testimony adverse to his or her position, Hannah v. Larche, 363 U.S. 420, 448-49, reh. denied 364 U.S. 855 (1960); there is no constitutional requirement that a witness be told that he or she is the subject of a grand jury's investigation, United States v. Washington, 431 U.S. U.S. 181, 186-89 (1977); a witness has no general right of appeal from the denial of a motion to quash a grand jury subpoena without risking a contempt citation, Cobbledick v. United States, 309 U.S. 323, 327-28 (1940); and while a witness is theoretically entitled to assert a privilege in response to an improper question, In Re Grand Jury Investigation (Hipes), 603 F.2d 786, 787 (9th Cir. 1979), the efficacy of such an entitlement must be questioned in light of the complexity of the privilege doctrine and the absence of the witness'counsel from the grand jury room.

Consequently, there can be little doubt that if, for example, an Internal Revenue Service investigation of possible taxpaper impropieties became thwarted before its completion, the temptation for an agency attorney to seek impanelment of a grand jury to continue the investigation would be overpowering.

WHEN THE GOVERNMENT PURSUES A CIVIL ACTION THERE IS NO REASON TO TREAT IT DIFFERENTLY FROM ANY OTHER CIVIL LITIGANT RESPECTING ITS DESIRE FOR WHOLESALE ACCESS TO GRAND JURY MATERIALS.

Another way to view the central question to be decided is whether the United States, when it brings a civil action, is entitled to civil discovery rights far surpassing those of any other civil litigant in the federal courts.

The effect of S.1676 would be as follows:
(1) when the United States initiates a civil suit, it would have an absolute ex parte right of access to inspect the transcripts and documents resulting from any federal grand jury's investigations; and (2) the private party defendant in that very same civil proceeding would be entitled to inspect such materials only after demonstrating to a court a particularized need to do so. Such a patently unfair law carries with it neither logical nor equitable support, and it is respectfully submitted that it should not be adopted by this Committee.

In Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979), the Supreme Court held that before private civil parties could obtain access to grand jury materials, they had to demonstrate that their "need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed."

It is axiomatic that the United States as a civil litigant is "bound by the discovery provisions of the Federal Rules of Civil Procedure in the same respects as any ordinary litigant." Sperandeo v. Milk Drivers & Dairy Employees, Local Union NO. 537, 334 F. 2d 381, 384 (10th Cir. 1964). See also United States v. Proctor & Gamble, Co. 356 U.S. 677, 681(1958); United States v. Carter Products, Inc., 27 F.R.D. 243, 245 (S.D.N.Y. 1961). There is no provision within the Federal Rules of Civil Procedure which provides that the Government has any right to examine grand jury transcripts or to inspect any documents subpoenaed by the grand jury on any basis not available to other civil parties. If this bill is adopted, the result will be an enormous and unacceptable disparity of knowledge and resources in many, if not most, civil actions brought by the Government. Under the bill, prior to the initiation of civil Governmental litigation, Civil Division attorneys would be entitled to read all pertinent documents and to review sworn testimony form all witnesses appearing before a grand jury. Indeed, the Government's discovery could well be complete even before its complaint is filed. The United States, like any other potential plaintiff, is of course entitled to undertake whatever factual investigation it desires prior to filing a civil action. However, no reason exists for granting the Government, as plaintiff, free access to documents and testimony produced pursuant to the subpoena and contempt powers of the grand jury when no such right is accorded the private civil litigant.

In Dennis v. United States, 384 U.S. 855, 873 (1966), the Supreme Court declared that the existence of such a disparity in the ability to obtain necessary information between the Government and a criminal defendant was impermissible, since "it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact." Such inequity is equally repugnant to the fundamental policies respecting equal access to information, which constitute the foundation of our civil discovery system:

> The basic philosophy of the present Federal procedure [respecting discovery] is that prior to trial every party in a civil action is entitled to the disclosure of all relevant information.

In re Master Key, 53 F.R.D. 87, 90 (D.Conn. 1971), n.3, quoting from 8C Wright & A. Miller, Federal Practice and Procedure (Section 2001, Purposes of Discovery) p. 15 (1970). See also, Hickman v. Taylor, 329 U.S. 495, 501 (1947) ("Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial."). Simply put, our system of civil justice requires that the race down the litigation road should not begin with the plaintiff having obtained a judicially sanctioned fifty yard head start. Moreover, even if the requirement that the Government separately conduct its own civil discovery would result in the Government's being forced to bear some additional financial costs, such an argument is of little moment. The Supreme Court has long recognized that the Government is often required to bear some increased burdens in order both to secure fundamental constitutional values and to protect significant rights of persons within the federal court system. See e.g. Miranda v. Arizona, 384 U.S. 436, 482-491 (1966).

Furthermore, requiring the United States to litigate under the same discovery rules as all other civil parties could not prejudice in the slightest the Government's ability to secure any civil remedy to which it may be entitled. So long as documents produced in response to a grand jury's subpoena are relevent and not privileged, the Government in a civil action is entitled to request their production pursuant to Rules 30(b) or 34 of the Federal Rules of Civil Procedure. Similarly, under Fed. R. Civ. P. 30, the Government is also entitled to depose any witness who may possess relevant information and elicit exactly the same type of sworn testimony as would be available in the transcripts of the grand jury hearings. In fact, the only changes between requiring the Government to pursue its civil discovery in accordance with the Federal Rules of Civil Procedure versus permitting it to engage in *ex parte* civil discovery pursuant to S.1676 would have salutory effects, *i.e.*, the civil defendant's attorney would have a right to be present during all discovery in order to interpose relevancy and materiality objections when appropriate; to caution his or her client when a privilege was being waived; to cross-examine any deposed witness; and generally to protect his or her client's rights.

If the information contained in grand jury materials is otherwise available, the Government must attempt to secure it through depositions, document production requests, interrogatories, or the like. If such information is not otherwise available, the Government should be directed, like any other civil party, to petition the court and demonstrate that its need for access to such materials outweighs the need for continued secrecy of those documents. Approval of the theory that the Government is entitled to grand jury transcripts and documents as a matter of right in *every* case without making such a showing would make empty the important fairness and equality of access premises on which the civil discovery rules are grounded, and should not be permitted.

GRANTING A CIVIL DIVISION ATTORNEY, EXECUTIVE AND CONGRESSIONAL EMPLOYEES WHOLESALE DISCOVERY OF THE FRUITS OF A CRIMINAL GRAND JURY'S INVESTIGATION AS A MATTER OF ABSOLUTE RIGHT IMPERMISSIBLY VIOLATES FUNDAMENTAL POLICIES OF GRAND JURY SECRECY

The pervasive thread running through all of the Supreme Court's decisions respecting a party's right of access to grand jury materials is that keeping the proceedings of the grand jury secret is of paramount importance to the effective functioning of that body:

> This Court has recognized the "long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts." *United States* v. *Proctor & Gamble*, 356 U.S. 677, 681. And it has ruled that, when disclosure is permitted, it is to be done "discreetly and limitedly." *Id.* at 683.

Dennis v. *United States*, 384 U.S. 855, 869 (1966). *See also* *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 219 (1979) ("courts have been reluctant to lift unnecessarily the veil of secrecy from the grand jury"); *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) ("This 'indispensible secrecy of grand jury proceedings,' *United States* v. *Johnson* [319 U.S. 503] at 513, must not be broken except where there is a compelling necessity"); *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 399, *reh. denied* 361 U.S. 855 (1959).

S. 1676 does not seek to lift the veil of grand jury secrecy "discretely and limitedly," upon a showing of "compelling necessity." On the contrary, the bill provides that the Government has an absolute right to rent the veil savagely and wantonly, and that *all* transcripts and *all* documents before the grand jury be made available in *every* case under *any* circumstance upon *no* showing whatsoever. On its face such a proposal falls outside any acceptable boundaries for the limited dissemination of grand jury materials demanded by the Supreme Court and must be rejected.

In *United States* v. *Proctor & Gamble, Co.*, 356 U.S. 677, 681-82 n.6 (1958), the Supreme Court set forth the policies underlying grand jury secrecy:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted y it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

The policies undergirding the traditional secrecy of a grand jury certainly apply to the subject of a grand jury investigation against whom no indictment is brought, and the fear that any testimony given before a grand jury could be revealed in future civil, as well as criminal, litigation might well put a damper on the "free and untrammeled disclosure" of a witness' knowledge of allegedly criminal activity. Thus, the policies behind grand jury secrecy must be taken into account in making the determination as to whether a Civil Division attorney should have access to secret grand jury documents. In other words, *Proctor & Gamble* requires that the Government, like any other civil party, must show that it needs the continued secrecy of those documents, and that a Civil Division attorney should not be granted wholesale access to such materials without a proper balancing of all the relevant and competing interests relating to their disclosure.

CONCLUSION

Adoption of S.1676 would only lead to unacceptable breach of the grand jury's traditional secrecy on a regular basis. Access to grand jury material by attorneys prosecuting a civil action and by executive and congressional staff would undermine the historical reason for grand jury use. S.1676 would greatly strengthen the Government's hand in civil litigation while concomitantly undermining the citizen's. Also, the citizen's privacy interest would be violated in that executive and congressional personnel would be able to see information obtained from the citizen in a forum that is highly unfavorable to him.

There is no compelling reason to pass S.1676. If the government *really* needs grand jury information it can obtain it under the present Federal Rules of Criminal Procedure. The Federal Rules of Civil Procedure provide ample access to all types of non-grand jury information. Again, thank you for requesting our comments on this bill. I respectfully request that this letter be included in the hearing record.

Very truly yours,

Antonio Calif

Antonio J. Califa
Legislative Counsel

AJC:dyt